84-1796

No. 84-_____

Office - Supreme Court, U.S.
FILED
MAY 16 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THE FOLGER COFFEE COMPANY,
Petitioner,

v.

INDIAN COFFEE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

John W. Beatty, Esq.
DINSMORE & SHOHL
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8200
ATTORNEY FOR PETITIONER
THE FOLGER COFFEE
COMPANY

OF COUNSEL:
Mark Silbersack, Esq.
Patrick D. Lane, Esq.
John D. Luken, Esq.
DINSMORE & SHOHL
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8200

Cloyd R. Mellott, Esq.
John W. Ubinger, Jr., Esq.
ECKERT, SEAMANS,
CHERIN & MELLOTT
42nd Floor
600 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 566-6000

88PP

QUESTIONS PRESENTED

1. In this Robinson-Patman regional price discrimination case, seeking treble damages under Clayton Act Section 4, Plaintiff-Respondent's theory of antitrust damages is premised upon the proposition that it would have used its alleged power as a "price leader" to raise prices in its sales area. In light of this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), has an antitrust plaintiff presented legally sufficient evidence of damages by asserting that, but for the increase in competition resulting from a defendant's new entry into plaintiff's competitively dormant regional sales area, it could have exercised price leadership to increase prices and profits?

2. In a Robinson-Patman Act regional price discrimination case brought by an established seller against a new entrant into its regional sales area, may "harm to competition" be inferred merely from "below-cost pricing" of the entrant despite the fact that the entrant did not have, and had no reasonable expectation of achieving, sufficient market power so as to permit recoupment of losses by means of future supra-normal profits?

3. In a Robinson-Patman regional price discrimination case brought by an established seller against a new entrant, may "harm to competition" be inferred merely from the fact that the entrant's lower-than-normal revenues and higher-than-normal costs, spread over low initial sales volume, result in "below-cost pricing" by the new entrant?

4. In a Robinson-Patman regional price discrimination case brought by an established seller against a new entrant, may "harm to competition" be established merely by proof of business losses (such as lost market share) of the established competitor following the defendant's entry?

5. Does a trial judge lose all discretion under Rule 703 of the Federal Rules of Evidence to exclude experts' damage

opinions which are based on (a) assumptions which are inherently speculative, (b) pre-trial opinions of the Plaintiff's owner withdrawn by him at trial, and (c) a theory of damages which would, even if valid, contravene basic antitrust policy, simply because the experts state their belief that it is reasonable for them to rely on such assumptions, opinions, and theory in calculating damages?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner The Folger Coffee Company was the appellee in the Court of Appeals and the defendant in the District Court.[1] Respondent Indian Coffee Corporation was an appellant in the Court of Appeals and the plaintiff in the District Court. Penn-Western Food Corporation, not named as a Respondent in this caption pursuant to Rule 19.6 of the United States Supreme Court Rules, was also an appellant in the Court of Appeals.

---

[1] Pursuant to Rule 28.1 of the United States Supreme Court Rules, Petitioner The Folger Coffee Company states that its parent company is The Procter & Gamble Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
PARTIES TO THE PROCEEDINGS BELOW	II
TABLE OF CONTENTS	III
TABLE OF AUTHORITIES	V
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
Nature of the Case	2
Statement of Facts	2
Statement of Proceedings Below	5
REASONS FOR GRANTING THE WRIT	6
INTRODUCTION	6
I. THE THIRD CIRCUIT'S DECISION WOULD IMPROPERLY ALLOW AN AWARD OF ANTITRUST DAMAGES PREMISED ON PLAINTIFF'S CLAIM THAT IT WOULD HAVE ACTED AS A "PRICE LEADER" TO RAISE PRICES IN A COMPETITIVELY DORMANT AREA	9
II. THE THIRD CIRCUIT HAS ADOPTED NOVEL, ILLOGICAL, AND ANTI-COMPETITIVE STANDARDS FOR PROVING "HARM TO COMPETITION" IN ROBINSON-PATMAN SECTION 2(a) CASES	12
A. The Third Circuit's Decision Would Erroneously Permit A Jury To Infer Harm to Competition From Below-Cost Sales Of A	

Page

Defendant Who Neither Possessed Nor Could Have Achieved Monopoly Power ... 15

B. The Third Circuit's Decision Would Improperly Permit A Jury To Infer Harm To Competition Solely From A New Entrant's Unprofitability 17

C. The Third Circuit's Decision Would Erroneously Permit A Jury To Decide That Loss of Sales By An Established Seller Following New Entry Constitutes Actual Harm To Competition 19

III. THE THIRD CIRCUIT'S DECISION WOULD DESTROY THE AUTHORITY OF TRIAL JUDGES TO ASSESS THE REASONABLENESS OF THE SOURCES UPON WHICH AN EXPERT RELIES IN PRESENTING DAMAGES OPINIONS IN ANTITRUST CASES 21

CONCLUSION 25

APPENDIX 1A

TABLE OF AUTHORITIES

Page

Cases:

Allegheny Pepsi-Cola Bottling Co. v. *Mid-Atlantic Coca-Cola Bottling Co.*, 690 F.2d 411 (4th Cir. 1982) 11

Anheuser-Busch, Inc. v. *FTC*, 289 F.2d 835 (7th Cir. 1961) 20

Automatic Canteen Co. v. *FTC*, 346 U.S. 61 (1953) ... 18-19

Barry Wright Corp. v. *ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) 15

Broadway Delivery Corp. v. *United Parcel Service, Inc.*, 651 F.2d 122 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981) 16

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 1, 6, 7, 9, 11, 12, 20, 24

Calhoun v. *Honda Motor Co.*, 738 F.2d 126 (6th Cir. 1984) 22, 24

California Computer Products, Inc. v. *International Business Machines Corp.*, 613 F.2d 727 (9th Cir. 1979) 11

Chrysler Credit Corp. v. *J. Truett Payne Co.*, 670 F.2d 575 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982) 23-24

Copperweld Corp. v. *Independence Tube Corp.*, 104 S. Ct. 2731 (1984) 20

Cunningham v. *Rendezvous, Inc.*, 699 F.2d 676 (4th Cir. 1983) 22, 24

D. E. Rogers Associates, Inc. v. *Gardner-Denver Co.*, 718 F.2d 1431 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 3513 (1984) 20

Dallas & Mavis Forwarding Co., Inc. v. *Stegall*, 659 F.2d 721 (6th Cir. 1981) 23

Page

Dean Milk Co. v. *FTC*, 395 F.2d 696 (7th Cir. 1968) ... 18

Falls City Industries, Inc. v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983) ... 13

General Leaseway v. *National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984) ... 12

Gray v. *Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973) ... 23

Great Atlantic & Pacific Tea Co. v. *FTC*, 440 U.S. 69 (1979) ... 18

Herman Schwabe, Inc. v. *United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962) ... 23

In re Borden, Inc., 92 F.T.C. 699 (1978), *aff'd*, *Borden, Inc.* v. *FTC*, 674 F.2d 498 (6th Cir. 1982), *vacated*, 461 U.S. 940 (1983), *modified*, Trade Reg. Rep. (CCH) ¶ 22,083 (FTC 1983) ... 18

In re General Foods Corp., No. 9085 (Initial Decision, January 25, 1981), *aff'd*, Trade Reg. Rep. (CCH) ¶ 22,142 (FTC 1984) ... 3, 16, 17

In re I. E. DuPont de Nemours & Co., 96 F.T.C. 653 (1980) ... 18

In re International Telephone and Telegraph Corp., No. 9000 (FTC 1984) ... 16, 20

In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983), *cert. granted*, 53 U.S.L.W. 3702 (U.S. April 1, 1985) (No. 83-2004) ... 5, 22

International Air Industries, Inc. v. *American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) ... 15, 20

J. Truett Payne v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981) ... 12, 23

Page

Joseph E. Seagram & Sons, Inc. v. *Hawaiian Oke & Liquors*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) 23

Kestenbaum v. *Falstaff Brewing Corp.*, 575 F.2d 564 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979) 11

MCI Communications Corp. v. *American Telephone and Telegraph Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983) 15

Merit Motors, Inc. v. *Chrysler Corp.*, 569 F.2d 666 (D.C. Cir. 1977) 22

Murphy Tugboat Co. v. *Crowley*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982) 11-12

National Dairy Products v. *FTC*, 412 F.2d 605 (7th Cir. 1969) 17-18

Northeastern Telephone Co. v. *American Telephone and Telegraph Co.*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) 15

Pacific Engineering & Production Co. v. *Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977) 12

Richter Concrete Corp. v. *Hilltop Concrete Corp.*, 691 F.2d 818 (6th Cir. 1982) 15

Shatkin v. *McDonnell Douglas Corp.*, 727 F.2d 202 (2d Cir. 1984) 22, 23

Soden v. *Freightliner Corp.*, 714 F.2d 498 (5th Cir. 1983) 22

United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 19

William Inglis & Sons Baking Co. v. *ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982) 15

Page

William Inglis & Sons Baking Co. v. *ITT Continental Baking Co.*, 461 F. Supp. 410 (N.D. Cal. 1978), *rev'd in part on other grounds*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982) 23

Statutes:

15 U.S.C. § 13(a) 2, 6, 7, 12, 13, 16, 17, 20, 25
15 U.S.C. § 15(a) 1, 2, 6, 25
28 U.S.C. § 1254(1) 2

Rules:

Rule 403 of the Federal Rules of Evidence 5, 23
Rule 703 of the Federal Rules of Evidence 1, 5, 21, 22, 23
Rule 28.1 of the Rules of the United States Supreme Court II

Secondary Authorities:

P. Areeda & D. Turner, *Antitrust Law* (1978 & Supp. 1982) 15, 16

Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975) 18

Joskow & Klevorick, *A Framework For Analyzing Predatory Pricing Policy*, 89 Yale L. J. 213 (1979) 16

R. Posner, *Antitrust Law: An Economic Perspective* (1976) 16

No. 84-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THE FOLGER COFFEE COMPANY,
Petitioner,

v.

INDIAN COFFEE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully requests that this Court issue a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Third Circuit entered on January 15, 1985, which reversed the decision of the United States District Court for the Western District of Pennsylvania granting a directed verdict in favor of Petitioner.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 752 F.2d 891. (1A-22A)[2] The oral and written opinions of the District Court granting the directed verdict are contained in the Appendix at 25A-39A.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1985. (1A-22A) A timely petition for rehearing or

[2] References to the Appendix are cited herein as "__A."

rehearing in banc was denied on February 15, 1985. (23A-24A) This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), and Section 4 of the Clayton Act, as amended, 15 U.S.C. § 15(a). The verbatim text of pertinent parts of these statutes is contained in the Appendix at 40A.

STATEMENT OF THE CASE

Nature of the Case

Respondent Indian Coffee Corporation ("Indian Coffee") filed its Complaint in November 1976 alleging a violation by Petitioner The Folger Coffee Company ("Folger") of Section 2(a) of the Clayton Act. Indian Coffee alleged that from October 1971 through April 1974 Folger sold regular coffee to grocers in Indian Coffee's sales area at prices lower than those which Folger charged elsewhere, that such geographic price discrimination caused primary-line harm to competition in Indian Coffee's sales area, and that Indian Coffee lost sales and profits as a result of such price discrimination, for which it sought treble damages under Section 4 of the Clayton Act.

Statement of Facts

For many years, Folger sold vacuum-packed coffee only in the western two-thirds of the country. In the early 1970's, Folger began to introduce its coffee into the eastern states. (3A) At the time of Folger's entry into Pittsburgh in March 1973, General Foods, which was the nation's largest manufacturer of coffee products, was the leading Pittsburgh seller; its various brands (Maxwell House, Sanka, Brim, Max Pax and Yuban) together held a commanding 50%-plus share

of sales. Indian Coffee sold its coffee products in the area surrounding Pittsburgh; its primary brand, "Breakfast Cheer," was the second leading brand, with about a 13% share. (2A-3A, 47A, 50A) Two other major national sellers — Hills Bros. (then a subsidiary of a multi-national Brazilian corporation) and Chase & Sanborn (then a subsidiary of Standard Brands Co.) — each had 6 to 9%. Private label brand coffees of large grocery chains accounted for another 25%. (51A)

Prior to Folger's introduction, competition among coffee manufacturers in Pittsburgh was "dormant," with limited and relatively infrequent price promotions. There was a "live-and-let-live" attitude between the two leading sellers, General Foods and Indian Coffee. (28A) Following Folger's entry, competition increased significantly and, predictably, the shares of the major competitors shifted: Folger managed to obtain a 12% share (its objective was only 20%), General Foods' Maxwell House brand *increased* its share from 37% to 49%,[3] Indian Coffee declined to 6%, and other sellers' shares also declined somewhat. (28A-29A, 47A, 51A)

Indian Coffee's business was in trouble prior to Folger's entry into Pittsburgh. Its share of Pittsburgh area sales had already decreased from 17.8% to 13.2% during 1972, and its sales volume had declined 26% in 1972. (51A, 49A) Indian Coffee's profitability, which had always been marginal,

---

[3] After a lengthy investigation of Folger's entry and General Foods' activities in reaction thereto, the F.T.C. filed a complaint in July 1976, charging that GF had engaged in predatory pricing intended to block Folger's entry and, thus, to maintain GF's monopoly profits in Pittsburgh and other areas in the East. GF was also accused of deliberately injuring small competitors such as Indian Coffee. *In re General Foods Corp.*, No. 9085 (Initial Decision, January 25, 1981), *aff'd*, Trade Reg. Rep. (CCH) ¶ 22,142 (FTC 1984). Instead of suing General Foods, Indian Coffee filed a treble damage action in November 1976 against the new entrant, Folger. Later, despite a finding that GF had engaged in geographic discrimination and below-cost pricing, the FTC dismissed the charges because, *inter alia*, the sale of coffee in the eastern United States was not susceptible to monopolization by any firm. *Id.*, at 22,988-89. Therefore, "below-cost" pricing, even by the dominant seller, GF, did not and could not cause harm to competition.

dropped to a net loss in 1972. (48A) These trends continued following Folger's entry until Indian Coffee sold its coffee business in early 1974 to Wechsler-Penn Coffee Corporation which thereafter continued to manufacture and sell "Breakfast Cheer" coffee in Pittsburgh. (3A, 42A)

As explained by its counsel at trial (*see* pages 9-11 below), Indian Coffee's theory of "antitrust injury" was that, but for Folger's entry and the ensuing increase in competition, it would have exercised its purported power as "price leader" in the Pittsburgh area to significantly *raise* general price levels and, thus, realize dramatically increased profits. Indian Coffee alleged that Folger's entry stimulated additional price competition which prevented it (and other sellers who would have followed its lead) from raising prices. It is these so-called "lost profits," together with a corresponding failure to achieve a substantial increase in the value of Indian Coffee's business that would have accompanied the much higher profits, which are claimed as antitrust damages.

Applying this theory, Indian Coffee's experts calculated the amount of its damages based on the assumption (provided to them *before trial* by Mr. Deily, Plaintiff's principal owner) that its promotion allowance level (i.e., discounts) could have been instantly reduced from 23% to 14% — tantamount to a substantial price increase — *without any loss of sales volume.* (41A-44A) This assumption allowed the experts to create on paper an instant additional $540,000 profit per year and, accordingly, a much higher going concern valuation. (41A)[4] At trial, however, Mr. Deily expressly retracted this critical foundation opinion, saying that "it would be foolish for me to sit here and tell you that I could go from 23 to 14 overnight." (43A) He instead expressed this as a mere "hope" or goal

---

[4] As a result, Indian Coffee, a company that in its best year ever (1971) only made $16,000 net profit and that Mr. Deily valued at less than $200,000 in sworn tax returns (52A), would have instantly become worth $4.5 million. (42A)

which he might achieve gradually, if at all. (44A) Indian Coffee's experts, however, did not modify or reduce their damage calculations correspondingly.

Statement of Proceedings Below

Following five weeks of trial in early 1983, Indian Coffee rested its case and Folger made two motions to the District Judge, Honorable Gustave Diamond — first, to strike Plaintiff's experts' testimony on damages; second, for a directed verdict.

On April 25, 1983, the District Judge orally announced his decision to strike Indian Coffee's expert damages testimony. The District Judge concluded that the experts' reliance on Mr. Deily's speculative, retracted opinions was unreasonable as a matter of law and that their testimony thus did not comply with the requirements of either Rule 703 or Rule 403 of the Federal Rules of Evidence. (44A-46A, 33A-34A)

On April 27th, the District Judge granted Folger's motion for a directed verdict and explained his reasoning in detail on the record. (25A-36A) This decision was later supplemented by a Memorandum Order dated April 29, 1983, setting forth legal authorities to support the earlier oral ruling. (37A-39A) The District Judge found that Indian Coffee's case was fatally deficient because of a total failure of proof on three separate issues: harm to competition, causation, and damages — each of which, in and of itself, warranted a directed verdict.

On appeal, the Third Circuit Court of Appeals (opinion by Gibbons, J.) primarily focused on the striking of the experts' testimony. It held that this constituted "legal error," relying on Judge Gibbons' prior opinion in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), *cert. granted*, 53 U.S.L.W. 3702 (U.S. April 2, 1985) (No. 83-2004). The court dealt perfunctorily with the antitrust and damages issues on which the directed verdict had been based and which are the subject of this petition:

(1) The court totally ignored the fact that Indian Coffee's "price leader" theory on antitrust damages is legally impermissible under *Brunswick Corp* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), with Judge Gibbons stating merely that he did not understand the relevance of *Brunswick*. (21A)

(2) Despite the fact that Folger was a new entrant with no more than a 12% share and no reasonable prospect or intention of gaining a monopoly position, the court ruled that Folger's alleged unprofitability in the Pittsburgh area supported an inference of "predatory intent" and therefore of "harm to competition." (20A-21A)

(3) Citing no authority and ignoring controlling precedents, the court erroneously held that loss of sales of a single existing competit*or* after new entry constitutes "actual competit*ive* injury." (21A) (Emphasis supplied)[5]

REASONS FOR GRANTING THE WRIT

Introduction

The Third Circuit's decision in this case is startlingly anticompetitive in its application of both Section 2(a) of the Robinson-Patman Act and Section 4 of the Clayton Act. Contrary to this Court's teaching that such statutes must be interpreted consistently with the basic antitrust policy of promoting competition, the opinion below would permit treble damages to be awarded premised on an alleged "right" of an

---

[5] Petitioner believes that the Third Circuit's decision on several other antitrust and damages issues is equally incorrect, although such rulings are not being raised in this petition. For example, the court disposed of Plaintiff's unsupported contention that its own sales area constituted a relevant geographic market by the simple expedient of mistakenly asserting (contrary to the record) that the parties had stipulated to this contested issue. (20A-21A) Likewise, the panel simply ignored the District Court's finding that Plaintiff failed to prove a causal connection between any of its problems and Folger's alleged price discrimination. (21A)

entrenched competitor to act as a "price leader" to raise prices to non-competitive levels in cooperation with other sellers, and would erect a judicial barrier to entry by allowing an inference of "harm to competition" to arise from the unprofitability of a new entrant or from existing sellers' declining sales after new entry.

Nothing highlights the anti-competitive nature of the Third Circuit's decision more eloquently than its endorsement of Indian Coffee's theory of antitrust injury. Paying no attention to this Court's decision in *Brunswick*, the Third Circuit would permit the recovery as damages of three times the profits which Indian Coffee says that it would have been able to obtain — by exercising its alleged "price leadership" position in Pittsburgh to raise overall coffee price levels — had it not been for the increased competition that Folger's entry stimulated. In other words, Indian Coffee claims a legally protected right to increase prices so as to obtain oligopolistic profits in a *non*-competitive area.

Moreover, Indian Coffee's underlying Robinson-Patman claim is itself unprecedented and grossly anti-competitive. By ignoring Folger's status as a new entrant, the Third Circuit's decision adopts a novel application of Section 2(a) which is inherently at odds with federal antitrust policy. The encouragement of new entry is fundamental to the procompetitive purpose of the antitrust laws as a means of enhancing competition, increasing consumer choices, and discouraging the sort of oligopolistic pricing conduct that was contemplated by Indian Coffee. This is particularly true in a competitively dormant area such as pre-Folger Pittsburgh, with its two dominant competitors, General Foods and Indian Coffee. The onset of vigorous competition that followed Folger's entry brought an end to their peaceful co-existence. Indian Coffee's sales volume and share continued to decline until its business was sold to another new entrant (who continued to operate it).

Thus, the essence of Indian Coffee's Robinson-Patman Section 2(a) complaint is simply that Folger sold at lower prices

in Pittsburgh than elsewhere; that Folger failed to make a profit as a new entrant; and that Indian Coffee lost sales. The Third Circuit has now decided that such a case *must* go to the jury. It is hard to imagine a more anticompetitive application of the Robinson-Patman Act for the obvious reason that such facts are *typical* of almost every geographic new entry. Most potential entrants are already selling elsewhere. Introductory promotional pricing is a necessary strategy routinely used by new entrants. It is almost inevitable that a new entrant will sell "below-cost" since it faces higher than normal costs spread over lower then normal sales volume. Moreover, it can be anticipated that entrenched sellers may lose business following entry of a major new competitor. To suggest that such circumstances justify an inference of predation on the part of the entrant battling for a toehold in a new sales area is illogical nonsense.

In effect, the Third Circuit has adopted what amounts to "automatic liability" for new entrant Robinson-Patman defendants. Under its unprecedented opinion, almost every entrant will face the threat of treble damage actions by established sellers, since the entrant will normally support its introduction with localized promotional pricing, will frequently be forced to sell "below-cost," and will usually cause existing sellers to lose some business. According to the court below, this *of itself* establishes a prima facie Robinson-Patman case! Such a rule of law seriously discourages new entry. The potential entrant's only viable options would be to lower its prices in all of its other sales areas to the promotional level needed for successful entry in the new area (thus greatly multiplying the effective cost of entry), or to forego promotional pricing altogether (thus endangering its entry). This creates a new artificial judicial barrier to pro-competitive new entry.

Petitioner, thus, respectfully submits that the Third Circuit's decision in this case is so patently anti-competitive, both as to a very unfortunate substantive interpretation of the Robinson-Patman Act and as to a highly improper use of the

treble damage remedy, that it requires consideration by this Court. Specific issues appropriate for review are explained below.

I. THE THIRD CIRCUIT'S DECISION WOULD IMPROPERLY ALLOW AN AWARD OF ANTITRUST DAMAGES PREMISED ON PLAINTIFF'S CLAIM THAT IT WOULD HAVE ACTED AS A "PRICE LEADER" TO RAISE PRICES IN A COMPETITIVELY DORMANT AREA

The stated policy of the antitrust laws is to preserve and enhance competition. Those laws only permit the recovery of damages on theories consistent with that policy. Certiorari should be granted here because the Third Circuit's opinion condones a clearly anti-competitive theory of antitrust damages which flies in the face of this Court's decision in *Brunswick* and directly conflicts with decisions of the Fourth, Fifth, Seventh, Ninth and Tenth Circuits. Indian Coffee seeks treble damages based on its supposed right as a "price leader" to raise the general level of prices in its sales area. This patently improper damages theory must be rejected.

The trial court expressly found that Folger's conduct had only pro-competitive effects. (28A-29A) Against this backdrop, the anti-competitive nature of Indian Coffee's damage theory stands in stark contrast. Indian Coffee explicitly sought damages on the theory that, but for Folger's competition, Indian Coffee would have led all of its competitors in raising prices to a non-competitive level sufficient to generate huge new profits. Indian Coffee's counsel unabashedly proclaimed this theory at trial:

> MR. LAUBACH: . . . Mr. Deily and certainly the other people testified also that the aggressive price leader during that particular period in time was Breakfast Cheer and that it was the one that was leading, if you will, in the period up through 1971, leading the price moves and apparently others were following it, and it could effec-

tively, it could effectively, if it is the leader, it could drop back [the promotion allowance levels, i.e., raise prices] . . . .

* * *

He was a market leader and other people were meeting him to get promotions, and as you back down [i.e., raise prices], they are just as happy to make money because there is nothing they want more than to make money.

* * *

[I]ntelligent businessmen take the opportunity when the price leader pulls back, . . .

[A]fter all, every businessman is in the business of trying to make money, and if his profit margin has been cut to four percent because everybody has high promotions, if the guy that is leading cuts back . . . [i.e., raises prices], they immediately take advantage of the opportunity in order to make money.

THE COURT: Maxwell House would do that, is that what you are saying?

MR. LAUBACH: Of course. Particularly Maxwell House.

(Excerpted from Third Circuit Appendix at 1269-76a)

Mr. Deily himself testified in support of this "price leader" theory as follows:

Q: Through 1971, who had been — what was the price leader in the Pittsburgh market?

A: Breakfast Cheer coffee.

Q: What did you expect of the competitors if you reduced your proposition? .

A: I figured . . . they were in business to make a profit the same as we were.

(Excerpted from Third Circuit Appendix at 556-57a)

In other words, Indian Coffee's damage theory was clearly premised on the contention that the increased competition following Folger's new entry thwarted its plans for cooperative profit enhancement with the other entrenched Pittsburgh area sellers. It openly seeks as damages the oligopolistic "lost profits" that it had hoped to achieve by exercising its alleged price leadership power to initiate a round of price increases.

This Court previously addressed the subject of anti-competitive damage theories in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), a case brought under Section 7 of the Clayton Act. The plaintiff there sought damages on the theory that the defendant, by merging with and thus saving a failing company, had deprived the plaintiff of the benefits of diminished competition. In a unanimous opinion by Mr. Justice Marshall, this Court held that it was inimical to the purpose of the antitrust laws to award damages premised on an assumed decrease of competition. *Id.* at 488, 490. In deciding *Brunswick*, this Court reversed a Third Circuit decision, also coincidentally authored by Judge Gibbons. In the present case, the Third Circuit again attempts to sanction a blatantly anti-competitive damages theory, this time in a Robinson-Patman case.

The law outside the Third Circuit is well developed in line with *Brunswick* in condemning damage theories like that presented in this case. For example, in *Kestenbaum* v. *Falstaff Brewing Corp.*, 575 F.2d 564, 569-70 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979), the court held that it would be a "manifest miscarriage of justice" to allow a plaintiff to recover on a damage theory premised on raising its prices in concert with other competitors in order to achieve greater profitability. Other circuit courts are equally opposed to such anti-competitive damage theories. *Allegheny Pepsi-Cola Bottling Co.* v. *Mid-Atlantic Coca-Cola Bottling Co.*, 690 F.2d 411, 414 (4th Cir. 1982); *California Computer Products, Inc.* v. *International Business Machines Corp.*, 613 F.2d 727, 732, 742 (9th Cir. 1979); *Murphy Tugboat Co.* v. *Crowley*, 658 F.2d 1256, 1259, 1262 (9th Cir. 1981), *cert. denied*, 455 U.S.

1018 (1982); *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 795-99 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977). *Cf. General Leaseway* v. *National Truck Leasing Ass'n*, 744 F.2d 588, 597 (7th Cir. 1984).

Notwithstanding *Brunswick* and the above body of law in other circuits, the Third Circuit has now adopted a clearly improper rule of law on antitrust damages that must be reversed. In *J. Truett Payne* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981) (stressing the need to prove actual antitrust injury), this Court extended *Brunswick* into the Robinson-Patman area. It is most important that the Court now additionally make it clear that *Brunswick's* prohibition against anti-competitive damage theories likewise governs Robinson-Patman cases. Moreover, this case provides a vehicle to examine and reject a damage theory which is somewhat different from, but analogous to, that considered in *Brunswick*. There, a competitive market was deteriorating, and the plaintiff sought to benefit from the demise of its competitors. Here, Indian Coffee was ensconced in a non-competitive "live-and-let-live" market and protests that the infusion of new competition aborted its plan to exploit the lack of competition by leading a general price increase. Folger submits that Indian Coffee's novel damage theory is far more perverse than that rejected in *Brunswick* since it is premised on anti-competitive conduct *by the plaintiff itself*. The Third Circuit's blessing of such a theory must be condemned.

II. THE THIRD CIRCUIT HAS ADOPTED NOVEL, ILLOGICAL, AND ANTI-COMPETITIVE STANDARDS FOR PROVING "HARM TO COMPETITION" IN ROBINSON-PATMAN SECTION 2(a) CASES

Section 2(a) prohibits price discrimination only where its effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 13(a). As Mr. Justice Blackmun said for a unamimous Court

in *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983), "To establish a prima facie § 2(a) violation, a plaintiff must show a reasonable possibility that a price discrimination will harm competition" and, in a treble damages case, a "showing of actual injury" attributable to the price discrimination. Review by this Court is necessary because the Third Circuit would virtually read this "harm to competition" requirement out of Robinson-Patman primary-line geographic price discrimination cases involving new entrant defendants. The court below would permit a jury to infer harm to competition on the basis of below-cost sales of a new entrant who had only a 12% share of sales and no expectation or intent to obtain a position of market dominance.

This case presents a particularly good opportunity to diminish current confusion as to when the so-called "double inference" rule should be applied in "predatory pricing" cases. Under that theory, "harm to competition" may be inferred from a defendant's "predatory intent," which may in turn be inferred from "below-cost" sales.[6] This rule has in recent years created substantial judicial and academic disputation resulting in conflicts among the circuits and uncertainty among enforcement authorities, practitioners, and businessmen. This case does *not* require resolution of the oft-debated issue as to the proper definition of "below-cost pricing." Rather, Petitioner asks the Court to consider issuing a clear statement concerning certain circumstances in which the double inference should be made *inapplicable*. Such a statement would clarify the law and assist in expeditious disposition of much particularly vexatious, complex antitrust litigation.

This case involves two situations in which the "double inference" rule should be declared *unavailable* as a matter of law:

---

[6] In this case, Indian Coffee offered no proof — by market analysis or otherwise — of actual harm to competition. (28A-29A) Indeed, the trial judge expressly found that Folger's entry had *enhanced* competition, and the Third Circuit did not dispute this conclusion. Nor was any evidence offered to show actual predatory intent. (29A-30A)

(1) The double inference is inherently illogical where a defendant can have no reasonable expectation of achieving market dominance so as to be able later to recoup its losses suffered during the alleged period of predatory pricing through future supra-normal profits. Thus, if a plaintiff cannot show that the market in question is susceptible to monopolization, inferential proof of harm to competition from evidence of "below-cost" pricing should not be permitted and, consequently, there is no need for complicated economic and accounting evidence of the sort common in "below-cost" pricing cases. On this point, Petitioner asks the Court to resolve a conflict between the decision below and decisions of several circuits and of the Federal Trade Commission.

(2) Where an alleged predatory pricer is a new entrant, the double inference rule is also illogical and anti-competitive, since unprofitable selling by a new entrant is practically unavoidable and does not imply predatory intent or an economic threat to the competitive process. Moreover, application of the rule in this situation is inimical to basic antitrust policy, since it discourages new entry and shields anti-competitive pricing behavior by established firms. On this point, the Court is asked to resolve a conflict between decisions of the Third and Seventh Circuits.

Moreover, despite repeated admonitions by this Court that injury to a single competit*or* does not establish harm to competit*ion*, the Third Circuit would find harm to competition from the loss of sales and profits of a single established seller during the market readjustment following a major new entry. This decision also requires reversal, both to eliminate a conflict among the circuits and to remove the threat of a chilling effect on new entry which such a rule of law creates.

A. The Third Circuit's Decision Would Erroneously Permit A Jury To Infer Harm To Competition From Below-Cost Sales Of A Defendant Who Neither Possessed Nor Could Have Achieved Monopoly Power.

In mechanically permitting use of the "double inference" in this case, the Third Circuit's decision ignores — indeed, contradicts — the very logic used to justify an inference of harm to competition from below-cost pricing. Pricing cannot be deemed "predatory" unless the purported predator can reasonably expect that its pricing practices will eliminate competition and enable it to obtain a dominant market position so that it can recoup its losses through future supranormal profits. "[W]ithout . . . the prospect of achieving and exploiting a monopoly, predation would ordinarily be irrational and may therefore be presumed absent . . . ." P. Areeda & D. Turner, *Antitrust Law* ¶ 711b, 153 n.11 (1978). Here, the Third Circuit would presume the opposite!

While the circuit courts have differed on how to define and apply cost-based tests of predation, there is a broad consensus that predatory pricing *requires* a showing of "deliberate sacrificing of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition." *Northeastern Telephone Co.* v. *American Telephone and Telegraph Co.*, 651 F.2d 76, 86 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). *See also Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 231 (1st Cir. 1983); *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 723 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Richter Concrete Corp.* v. *Hilltop Concrete Corp.*, 691 F.2d 818, 823 (6th Cir. 1982); *MCI Communications Corp.* v. *American Telephone and Telegraph Co.*, 708 F.2d 1081, 1112 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1031 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

Indeed, a growing body of case law and scholarly commentary would permit use of the double inference *only after* a preliminary showing that the seller had the ability to achieve exploitable monopoly power through predatory pricing. *Broadway Delivery Corp.* v. *United Parcel Service, Inc.*, 651 F.2d 122, 130 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981); *In re General Foods Corp.*, Trade Reg. Rep. (CCH) ¶ 22,142 at 22,975-77, 22,988-89 (FTC 1984); *In re International Telephone and Telegraph Corp.*, No. 9000, Slip Op. at 29-30, 36-37, 65 (FTC 1984); Joskow & Klevorick, *A Framework For Analyzing Predatory Pricing Policy*, 89 Yale L. J. 213, 244 (1979); R. Posner, *Antitrust Law: An Economic Perspective* at 191 (1976); P. Areeda & D. Turner, *Antitrust Law* ¶ 711.2 (Supp. 1982) at 123-24.

The opinion below does not suggest that Pittsburgh was a market susceptible to predatory pricing. Indeed, left unchallenged are the trial judge's determinations that (i) Folger did not and could not achieve monopoly power (31A), and (ii) competition in Pittsburgh was actually *improved* as a result of Folger's entry (28A-29A). The Third Circuit would thus permit an *illogical inference* of competitive injury that flies in the face of the undisputed contrary conclusions of the District Court. Review by this Court is needed to clarify the fact that the "harm to competition" element of a Section 2(a) violation *cannot* be established by proof of below-cost prices of a seller who has no reasonable prospect of obtaining a monopoly position.

The illogic of the Third Circuit's decision is readily apparent when its holding is contrasted to the decision in *In re General Foods Corp.*, No. 9085 (Initial Decision, January 25, 1981), *aff'd*, Trade Reg. Rep. (CCH) ¶ 22,142 (FTC 1984), which involved *exactly* the same events as this case. Even though General Foods had over 50% of the sales, was clearly selling below cost for quite some time in Pittsburgh, Initial Decision at 109-10, and was clearly engaged in geographic price discrimination, the FTC's charges were dismissed. The

FTC held that a predatory pricing claim could not be sustained because sale of coffee in the Pittsburgh area was not susceptible to monopolization, even by General Foods! Trade Reg. Rep. (CCH) ¶ 22,142 at 22,988-89. Obviously, if the double inference is inapplicable to the established sales leader with a commanding share, it must be impermissible for a new entrant which attains only a 12% share. The Third Circuit's contrary conclusion is simply perverse. The FTC, as the agency primarily responsible for enforcement of the Robinson-Patman Act, examined these facts and concluded that the events surrounding Folger's entry into Pittsburgh and General Foods' response represented vigorous but *lawful* competition, even for the dominant seller. The Third Circuit, on the other hand, would permit a jury to speculate that the new entrant with but 12% of sales caused harm to competition by stimulating competition in a competitively dormant area!

B. The Third Circuit's Decision Would Improperly Permit A Jury To Infer Harm To Competition Solely From A New Entrant's Unprofitability.

The double-inference approach is also unavailable in this case because Folger was a new entrant. No inference of harm to competition logically flows from a new entrant's sales below cost. New entry is an inherently pro-competitive event which the antitrust laws encourage. However, a new entrant unavoidably faces lower revenues and higher costs than other sellers, so that losses are to be expected and are entirely normal. From such initial unprofitability, the Third Circuit would permit a jury to infer predatory intent and, therefore, harm to competition. This stands the Section 2(a) and antitrust policy on its head.

Lower courts, the FTC, and legal scholars have consistently rejected the Third Circuit's mistaken notion that a new entrant's below-cost selling is evidence of predatory intent. *See, e.g., National Dairy Products* v. *FTC*, 412 F.2d 605, 621 n.10 (7th Cir. 1969) ("an entirely different principle of law

governs" the new entry situation); *Dean Milk Co.* v. *FTC*, 395 F.2d 696, 708 n.24 (7th Cir. 1968). *See also In re I. E. DuPont de Nemours & Co.*, 96 F.T.C. 653, 738-39 (1980) (new or recent entrant might have "to engage in below cost pricing" to achieve market penetration); *In re Borden, Inc.*, 92 F.T.C. 699, 790-91, 798 n.28 (1978), *aff'd, Borden, Inc.* v. *FTC*, 674 F.2d 498 (6th Cir. 1982), *vacated*, 461 U.S. 940 (1983), *modified*, Trade Reg. Rep. (CCH) ¶ 22,083 (FTC 1983); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 704 (below-cost pricing by a new entrant "promotes rather than retards competition").

Thus, the Third Circuit's allowance of an inference of harm to competition solely on the basis of below-cost sales by a new entrant which achieves only a 12% share conflicts with decisions of other circuit courts and the FTC. Approval of the double inference in this situation is novel, patently illogical, and contrary to economic theory, business reality, and common sense. Most significantly, it represents a dangerous interpretation of the Robinson-Patman Act in a manner antipathetic to the basic pro-competitive policy underlying the antitrust laws. Since a new geographic entrant is commonly a firm already selling elsewhere at prices higher than its introductory promotional prices, the Third Circuit's decision in this case would in effect impose *automatic Robinson-Patman liability* (i.e., "price discrimination" plus inferred "harm to competition" from below cost sales) on most entrants. This will inevitably discourage entry by the potential competitors most likely to try to break into a non-competitive area — i.e., sellers already operating elsewhere. The rule of law adopted by the court below, so patently at odds with basic antitrust policy, must be rejected as an improper application of the Robinson-Patman Act.[7]

---

[7] This Court has repeatedly cautioned against applying the Robinson-Patman Act in a manner at odds with basic antitrust policy. *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80 n.13 (1979); *Automatic Canteen*

(Footnote continued on next page)

C. The Third Circuit's Decision Would Erroneously Permit A Jury To Decide That Loss of Sales By An Established Seller Following New Entry Constitutes Actual Harm To Competition.

Indian Coffee introduced no market analysis or expert evidence as to actual competitive injury. (28A) Indeed, as the trial judge held, the *only* conclusion which a jury could have reasonably drawn from Plaintiff's evidence was that Folger's actions *enhanced* competition in a previously dormant market. (28A, 31A) The Third Circuit did not question this conclusion, but nevertheless found that there was "evidence from which the jury could find the elimination in a stipulated regional market of a regional competitor holding an 18% market share — actual competitive injury . . . ." (21A)[8] The

---

Co. v. *FTC*, 346 U.S. 61, 63 (1953); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 458 (1978).

That the Third Circuit's decision — contrary to fundamental antitrust policy — will discourage new entry is obvious. An over-priced competitively dormant area like Pittsburgh would be expected to attract new entrants among companies selling elsewhere. Primary obstacles to entry are the grocery trade's reluctance to take on yet another brand in a declining category like coffee, and consumers' reluctance to buy an untried new product. Such entry barriers are usually scaled by promotional pricing and consumer promotions and advertising. This means high costs and low revenue — i.e. unprofitability — for the new entrant.

To apply the double inference in these circumstances is to raise a judicial barrier which, if upheld, will significantly inhibit new entry. The potential entrant will face draconian options: either cut their prices in *all* areas to the level needed to gain entry into a new sales area, which, obviously, significantly raises the price of entry; or forego localized introductory promotions entirely, which would be likely to frustrate any attempt to gain entry in the new area; or run the risk of expensive antitrust litigation and possible treble damages.

[8] Aside from its insufficiency as a statement of law, the quoted language is unfortunately characteristic of the panel's review of the record. Neither the product market nor the geographic market was ever stipulated; each was hotly contested both at the trial and in the briefs on appeal. (27A-28A; 32A) Moreover, although Indian Coffee sold its interest in the brand, Breakfast Cheer was not eliminated as a competitor, since it continued to be marketed by another owner. (42A)

opinion thus incorrectly equates injury (i.e., loss of sales) to a *competitor* with injury to *competition*.

The Third Circuit's notion that "actual competitive injury" can be premised solely on the loss of sales or the demise of a single competitor cannot be reconciled with this Court's repeated statements that the antitrust laws "were enacted for the protection of *competition* not *competitors*." *Brunswick*, 429 U.S. at 488 (emphasis in original). *See also Copperweld Corp.* v. *Independence Tube Corp.*, 104 S. Ct. 2731, 2740 n.14 (1984). Indeed, the Third Circuit's holding that one seller's misfortune can constitute actual competitive injury conflicts with the holdings of every other circuit court that has addressed this question. *See, e.g., International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 721 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *D. E. Rogers Associates, Inc.* v. *Gardner-Denver Co.*, 718 F.2d 1431, 1439 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 3513 (1984); *Anheuser-Busch, Inc.* v. *FTC*, 289 F.2d 835, 840 (7th Cir. 1961). *See also In re International Telephone and Telegraph Corp.*, No. 9000 (FTC 1984), Slip Op. at 63-4. The decision below creates a split among the circuits concerning direct proof of "harm to competition" requiring this Court's review.

The Third Circuit's decision should also be reversed because of its anti-competitive impact. New entry by a firm which is selling in other areas will often involve both lower introductory promotional pricing (i.e., a geographic "price discrimination") *and* a decrease in the market shares of existing sellers in the new sales area (perhaps also causing a marginal producer to fail). Thus, the rule of law adopted by the Third Circuit in this case would impose virtual automatic Robinson-Patman liability on most potential entrants. This would have a profound chilling effect on new entry by providing high-price, cost-inefficient sellers in non-competitive areas with a weapon to insulate themselves from the threat of increased competition. Such an unwarranted interpretation of Section 2(a) is contrary to basic antitrust policy and must be reversed.

III. THE THIRD CIRCUIT'S DECISION WOULD DESTROY THE AUTHORITY OF TRIAL JUDGES TO ASSESS THE REASONABLENESS OF THE SOURCES UPON WHICH AN EXPERT RELIES IN PRESENTING DAMAGES OPINIONS IN ANTITRUST CASES

The Third Circuit's decision interprets Rule 703 of the Federal Rules of Evidence in such a way as to render it virtually impossible for a district judge to exercise any control over the admission of expert opinions. It would permit the admission of damages opinions which are clearly improper as a matter of substantive antitrust law, which are impermissibly speculative, and which are based on pre-trial marketing opinions of the plaintiff which are retracted at trial. The Third Circuit's decision in this respect conflicts with decisions of the Second, Fourth, Fifth, Sixth and D.C. Circuits. Petitioner asks the Court to resolve that conflict and to remedy the evidentiary problems that the opinion below will cause for trial judges attempting to apply Rule 703 to highly questionable expert testimony.

All of Indian Coffee's expert witnesses on damages based their testimony on Mr. Deily's unsupported statements that he could reduce the amount Indian Coffee spent on promotional allowances by over one-third (tantamount to a substantial price increase) with *no* attendant loss in sales. (34A, 44A-46A) The trial court excluded the experts' opinions based on such testimony, ruling that "it was unreasonable for the experts to rely on that kind of an opinion and therefore one of the elements necessary under Rule 703 for the rendering of an expert opinion was absent." (34A). The Third Circuit reversed, based on its interpretation of Rule 703. According to the Third Circuit, a trial judge has *no* role in assessing the reasonableness of the bases of an expert's testimony; the expert *himself* decides this foundational question, and once he utters the magical incantation that *he* believes it is reasonable to rely on the source in question, his opinion *must* be admit-

ted, no matter how preposterous or contrary to established precedent it may be to rely on the source.

In so holding, the Third Circuit sets itself in direct conflict with other circuit courts, which have consistently held that a federal trial judge *does* have the power to examine the reasonableness of an expert's reliance on the sources upon which his testimony depends. *Calhoun* v. *Honda Motor Co.*, 738 F.2d 126 (6th Cir. 1984); *Shatkin* v. *McDonnell Douglas Corp.*, 727 F.2d 202 (2d Cir. 1984); *Soden* v. *Freightliner Corp.*, 714 F.2d 498 (5th Cir. 1983); *Cunningham* v. *Rendezvous, Inc.*, 699 F.2d 676 (4th Cir. 1983); *Merit Motors, Inc.* v. *Chrysler Corp.*, 569 F.2d 666 (D.C. Cir. 1977).

The Third Circuit's decision in this case is a further extension of its earlier decision in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), *cert. granted on other issues*, 53 U.S.L.W. 3702 (U.S. April 2, 1985) (No. 83-2004). Carrying its misinterpretation of the Rule 703 to an embarrassing extreme, the Third Circuit has now decided that an expert's opinon testimony *must* be admitted even though (1) it is based upon highly speculative, unsupported, out-of-court marketing opinions of an interested party (2) which are retracted at trial, (3) which would in any event, even if true and not withdrawn at trial, constitute a violation of federal antitrust law and policy.[9]

Each of Plaintiff's experts freely admitted that he relied upon Mr. Deily's pre-trial opinion that Indian Coffee could have, in one fell swoop, dramatically slashed promotions

---

[9] For these reasons, this action presented a different and more compelling case for certiorari than *Japanese Electronic Products* both with respect to the Third Circuit's basic error in construing Rule 703 and its misapplication to antitrust damage evidence. In addition, it is important to note that *Japanese Electronic Products* arose in the context of a pre-trial summary judgment motion and the district court's ruling was based solely on affidavits, while the instant case arises out of a directed verdict after the plaintiff's experts testified. The trial judge here thus had a far better opportunity to assess the reliability of the experts' sources than in *Japanese Electronic Products*.

(i.e., raised prices) with no loss of sales volume. The District Judge ruled that it was unreasonable under Rule 703[10] for the experts to rely on such an opinion. Mr. Deily's out-of-court statements were precisely the sort of unsubstantiated and self-serving speculations of an interested party that could not, if offered on their own, provide a basis for an award of damages in an antitrust case. *See, e.g., Gray* v. *Shell Oil Co.*, 469 F.2d 742, 749-50 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973) (rejecting reliance on assumption provided by plaintiffs that they could have raised their prices without losing any volume, an opinion characterized as "rampant speculation"); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 461 F. Supp. 410, 424 (N.D. Cal. 1978), *rev'd in part on other grounds*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982) (rejecting damage projection relying on assumption that plaintiff could have sold same number of units at a higher price in a highly competitive market). As Mr. Justice Powell wrote in *J. Truett Payne Co.* v. *Chrysler, Motors Corp.*, 451 U.S. 557, 578 (1981) (dissenting opinion), concerning similar testimony by an owner on which damages were calculated, "evidence as flimsy as this was insufficient to go to the jury." As the Fifth Circuit said on remand in *Payne*, "Self-serving and unsupported assumptions cannot sustain a calculation of going concern value." *Chrysler*

---

[10] The district judge here reached the same conclusion under Rule 403, which permits the exclusion of evidence if its probative value is outweighed by the danger of misleading the jury. *See, e.g., Shatkin* v. *McDonnell Douglas Corp.*, 727 F.2d 202, 208 (2d Cir. 1984) (expert testimony "would probably have hopelessly confused and misled the jury because of the latter's inability to appraise the extremely questionable and unsupportable assumptions underlying the testimony."); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors*, 416 F.2d 71, 87 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.* 297 F.2d 906, 912-13 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962) (assumptions underlying projected damages were without support and too difficult for jury to evaluate). *See also Dallas & Mavis Forwarding Co., Inc.* v. *Stegall*, 659 F.2d 721, 722 (6th Cir. 1981). The Third Circuit completely ignored the District Court's reliance on Rule 403 and the very broad discretion that a trial judge is accorded thereunder to exclude improper opinion testimony.

Credit Corp. v. *J. Truett Payne Co.*, 670 F.2d 575, 582 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982).

Moreover, Mr. Deily at trial *abandoned* his pre-trial opinion, stating instead that he had merely "hoped" to raise prices while maintaining sales, and that price increases would have had to be instituted gradually, if at all! (43A-44A) In so testifying, Mr. Deily undercut the fundamental assumption upon which his experts relied, leaving their opinions bereft of any record support — indeed, contrary to the record — on this critical point. Expert opinions *must* be consistent with the evidence before the jury. *Cunningham* v. *Rendezvous, Inc.*, 696 F.2d at 678; *see also Calhoun* v. *Honda Motor Co.*, 738 F.2d at 132. Again, the Third Circuit's action in the instant case stands in sharp contrast to the approach taken by other circuit courts.

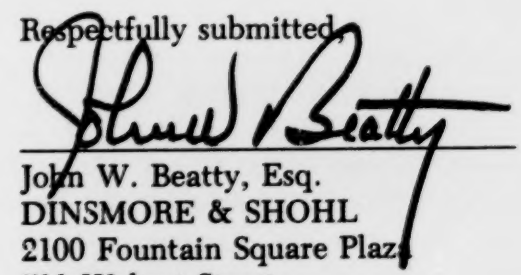
Another major flaw in Plaintiff's expert testimony was that it was based on an assumption which, if true, would itself contravene federal antitrust law — i.e., that Indian Coffee would have substantially increased profits in a non-competitive market by leading a round of price increases. As previously described (*see* pages 11-12 above) the other circuit courts, following this Court's definition of compensable "antitrust injury" in *Brunswick*, have consistently rejected damages testimony premised upon theories of recovery which would themselves represent a violation of federal antitrust law or policy.

The Federal Rules of Evidence preserve the power of trial judges to control the introduction of expert testimony. Where an expert relies unreasonably upon unreliable sources, or when his opinion utterly lacks support in the record, the trial judge may exclude the testimony. Certiorari should be granted here to review a rule of law announced by the Third Circuit that strips trial judges of this power.

CONCLUSION

The Third Circuit's opinion in this case is replete with dramatic misinterpretations of Sections 2(a) and 4 of the Clayton Act. If allowed to stand uncorrected by this Court, it will create anarchy in the law among the circuits on such important issues as (1) whether inability to act as a price leader to raise price levels in a non-competitive area constitutes compensable "antitrust injury"; (2) whether harm to competition may be proven simply by showing that a new entrant with a small share of sales and no chance of attaining market dominance was selling below cost; (3) whether loss of business by an existing seller after new entry constitutes harm to competition; and (4) whether a district judge has any discretion to exclude unsupported and clearly improper expert testimony. The Third Circuit's decision on each of these issues threatens to do substantial mischief in future antitrust cases and should be reversed by this Court.

Respectfully submitted,



John W. Beatty, Esq.
DINSMORE & SHOHL
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8200
ATTORNEY FOR PETITIONER
THE FOLGER COFFEE
COMPANY

OF COUNSEL:

Mark Silbersack, Esq.
Patrick D. Lane, Esq.
John D. Luken, Esq.
DINSMORE & SHOHL
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8200

Cloyd R. Mellott, Esq.
John W. Ubinger, Jr., Esq.
ECKERT, SEAMANS, CHERIN & MELLOTT
42nd Floor
600 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 566-6000

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
Opinion of the United States Court of Appeals for the Third Circuit, January 15, 1985 (752 F.2d 891)	1A
Order of the United States Court of Appeals for the Third Circuit Denying Rehearing and Rehearing In Banc, February 15, 1985	23A
Oral Opinion of the United States District Court for the Western District of Pennsylvania, April 27, 1983	25A
Memorandum Order of the United States District Court for the Western District of Pennsylvania, April 29, 1983	37A
Statutes Involved	40A
Excerpt From Third Circuit Appendix at 481a	41A
Excerpt From Third Circuit Appendix at 486a-487a	41A
Excerpt From Third Circuit Appendix at 494a-495a	42A
Excerpt From Third Circuit Appendix at 532a	42A
Excerpt From Third Circuit Appendix at 533a-536a, 558a-559a	42A
Excerpt From Third Circuit Appendix at 1264a-1265a, 1272a-1274a	44A
Plaintiff's Exhibit 287 Revised	47A
Plaintiff's Exhibit 350	48A
Plaintiff's Exhibit 351	49A
Excerpts From Plaintiff's Exhibit 354	50A
Plaintiff's Exhibit 544A	51A
Defendant's Exhibit 849 (Facsimile)	52A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5409

INDIAN COFFEE CORP., a Corporation,
and PENN-WESTERN FOOD CORP.,
a Corporation

v.

THE PROCTER & GAMBLE COMPANY, a Corporation,
and THE FOLGER COFFEE COMPANY,
a Corporation

Indian Coffee Corp. and
Penn-Western Food Corp.,
Appellants

(D.C. Civil No. 76-1362)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Argued: May 15, 1984
Before: GIBBONS and HUNTER, *Circuit Judges*
and STAPLETON, *District Judge**

(Opinion Filed: January 15, 1985)

OPINION OF THE COURT

---

*Hon. Walter K. Stapleton. United States District Judge for the District of Delaware, sitting by designation.

GIBBONS, *Circuit Judge:*

Indian Coffee Corp. ("Indian Coffee") appeals from a judgment entered after the grant of a Fed. R. Civ. P. 50(a) motion against it at the end of its case in its suit charging that Folger Coffee Company ("Folger") violated section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. 15 U.S.C. § 13(a) (1982). Penn-Western Food Corp. ("Penn-Western"), a wholly-owned subsidiary of Indian Coffee, appeals from a summary judgment in favor of Folger on the same charge. Both plaintiffs allege that Folger, in the years 1971 through 1974, sold coffee in the geographic market in which Folger competed with them at prices lower than Folger charged in other geographic markets. We affirm the summary judgment against Penn-Western. We reverse the judgment against Indian Coffee and remand for a new trial, because on this record a directed verdict was improper.

I.

The Parties and Proceedings in the Trial Court

Indian Coffee is a coffee roaster located in Pittsburgh, Pennsylvania, which for more than fifty years has marketed locally a brand of vacuum-packed coffee called Breakfast Cheer. That brand, until 1968, was marketed only in the greater Pittsburgh area, which includes parts of eastern Ohio. In 1968, Indian Coffee, having acquired greater plant capacity, extended its marketing of Breakfast Cheer to the Cleveland, Ohio area. Neither Indian Coffee nor its subsidiary, Penn-Western, competed outside these geographic areas. In its primary marketing area around Pittsburgh, prior to 1973, it competed with Maxwell House, Hills Brothers, Chase & Sanborn, and an assortment of private label brands.[1]

---

[1] Private label brands are brands packaged for retailers by coffee roasters in packages labelled with the retailer's brand designations.

Breakfast Cheer's market share was, in that geographic market, second only to that of Maxwell House.

Folger, prior to 1971, was a leading seller of branded coffee west of the Mississippi. Late in that year, for the first time, Folger commenced marketing its brand of coffee in Pittsburgh. Its efforts to gain market share in the geographic area in which for the first time it competed with Breakfast Cheer led to this lawsuit.

The theory of plaintiffs' case is that when Folger entered the Pittsburgh market area it sold coffee to retailers in that area at prices significantly lower than the prices which it charged in other geographic markets. For a time plaintiffs attempted to retain their market share by meeting the price concessions made by Folger. Because the plaintiffs sold only in the Pittsburgh and Cleveland geographic areas, however, they were unable to subsidize sales below cost in their sole marketing area with the profits derived from other geographic markets and were forced out of business. In April of 1974 they sold their coffee business. Thus, according to the plaintiffs, Folger's geographic price discrimination eliminated a theretofore vigorous primary line regional competitor.

Folger moved for summary judgment against Penn-Western on the ground that because Penn-Western had sold all its assets, including its possible claims against Folger, to Wechsler-Penn Coffee Corp. ("Wechsler"), Penn-Western lacked standing to bring this action.

Indian Coffee's claim against Folger proceeded to trial. Indian Coffee produced evidence that Folger, in the relevant markets, afforded to retailers various forms of allowances which were greater than the allowances offered in other geographic markets. In support of its claim that it was injured in its business and property, it produced the testimony of its president, James Deily, and the opinions of several experts. At the end of Indian Coffee's case the trial court struck the testimony of its experts, and directed a verdict against it. Absent the stricken testimony, the court held, there was insufficient evidence to create a jury question on the issue of harm

to competition, insufficient evidence that Folger's pricing practices caused Indian Coffee injury, and insufficient evidence to support a non-speculative award of damages. This appeal followed.

II.

Summary Judgment Against Penn-Western

We have reviewed the pleadings, affidavits, and depositions on file, and find no error in the trial court's conclusion that the unambiguous terms of the agreement of sale of Penn-Western's assets to Wechsler transferred to Wechsler any Penn-Western claim against Folger. The language of the agreement is unequivocal. Indian Coffee expressly reserved the right to prosecute antitrust claims for damages. Penn-Western did not. The parties' intention is manifested in the writing, and construction of the writing is a question for the court. *E.g.*, *Fogel Refrigerator Co. v. Oteri*, 391 Pa. 188, 137 A.2d 225, 228 (1958); *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1271 (3d Cir. 1979).

III.

Directed Verdict Against Western Coffee

A Rule 50(a) directed verdict may be granted only if, as a matter of law, viewing all the evidence which has been tendered and should have been admitted in the light most favorable to the party opposing the motion, no jury could decide in that party's favor. Our review of the grant of such a motion is plenary. Thus our task on Indian Coffee's appeal is to determine (1) what evidence should have been admitted, and (2) whether in light of all such evidence a *prima facie* case has been made out.

A.

The Court Erred in Striking Expert Opinion Evidence

In ruling on the admissibility of expert opinion testimony tendered by Indian Coffee, the trial court explicitly adopted

the standard announced in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F. Supp. 1313, 1341 (E.D. Pa. 1980). That standard permits the trial court to exclude opinion evidence based not upon materials on which experts in the relevant field base their opinion, but upon the court's own judgment of the reliability of those materials. The opinion upon which the trial court relied was reversed.[2] In *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 277 (3d Cir. 1983), we held:

> In substituting its own opinion as to what constitutes reasonable reliance for that of the experts in the relevant fields the trial court misinterpreted Rule 703. The court's approach involved fundamental legal error because, as a matter of law, the district court must make a factual inquiry and finding as to what data experts in the field find reliable. There is no discretion to forbear from making this inquiry and finding. Insofar as the district court substituted its own view of reasonable reliance for those of the experts, therefore, we review for legal error.

Nowhere did the trial court focus on the relevant inquiry as to what admittedly qualified experts in valuation of businesses relied upon. The court failed to make a finding as to what data experts in the field find reliable; instead it substituted its own judgment for that of the experts. This appraoch is prohibited by the governing case law interpreting Fed. R. Evid. 703. The excluded expert opinion evidence was clearly admissible. *See Bauman v. Centex Corp.*, 611 F.2d 1115, 1120 (5th Cir. 1980); *Baumholsee v. Amax Coal Co.*, 630 F.2d 550, 553 (7th Cir. 1980).

Robert S. Kaplan, Dean of the business school at Carnegie-Mellon University, who qualified as an expert in the use of analytical models for valuation of businesses, made an analysis of the valuation of Indian Coffee at the end of 1972

---

[2] The opinion which reversed the *Zenith Radio Corp.* standard, In re Japanese Electronic Products, 723 F.2d 238 (1983), had not been filed at the time the trial court struck Indian Coffee's expert testimony.

for a reasonably knowledgable observer. He testified that an expert in such valuations would, and he did, talk to Mr. Deily, an officer and director of the company, about its operations in order to become familiar with them so as to help interpret the financial numbers he would later study. He relied on the audited financial returns of the company through 1972, and drew his own conclusions. While he relied on those audited financial returns, he used supplementary data to corroborate the reasonableness of the estimates he obtained from his detailed study. Those financial statements, plaintiffs' exhibits 292 through 300, are in evidence. He also looked at unaudited internal statements, some of which had a more detailed breakdown of product lines and revenues, to get an overall feel for the pattern of sales and experience during the year, as well as the importance of product lines. He also examined summaries prepared by Dr. George Bodnar. That information, reflected in plaintiffs' exhibit 304 in evidence, includes the percentage of coffee sales for Indian Coffee by three major categories, its brand Breakfast Cheer, its private label, and its institutional coffee sales. He was asked to evaluate the business as of December 31, 1972, and testified that the operations of the company for the years 1969 through 1972 were the most appropriate indicators to an interested buyer or lender of the company's future. He also considered the relative profitability of other coffee companies, obtaining that information from reasonable sources, including information obtained from the defendants in this lawsuit, and information obtained about other coffee companies prepared by staff accountants of the Federal Trade Commission.

The foundation for admissibility of his expert opinion testimony based on the materials he examined was clearly established. Dean Kaplan was asked:

Q . Is this a typical procedure, getting whatever information is reasonably available to use in making evaluations of the sort you were hired to make?

A . Sure, when you do this type of research, it is a little

like being a detective, you kind of snoop around in a lot of data and forms, most of which is not very helpful, and occasionally you find a little nugget that you can look at very carefully, assess that it may not be the same type of information that you really wanted, but at least it is something. Whereas before you had nothing, now you have some little clues to help you.

Q . And is this the procedure which you would follow in evaluating any business, be it a coffee business or any other business where the information is not all directly publicly available?

A . You have to do whatever you can to get whatever relevant information you can find from whatever sources.

App. I, 623.

With respect to the information obtained from the Federal Trade Commission, Dean Kaplan was asked, and answered:

Q . And did you consider this information to be worthy of looking at in this connection?

A . Yes. I did look at it, and in fact found parts of it that would be helpful in enabling me to understand the operations of the Indian Coffee Company during the 1969 to 1972 time period.

Q . Was information of the sort about Maxwell House which you received that you would normally use, given the circumstances of the availability of information in the areas in which you were exploring?

A . It is exactly the type of information one would like to have in this situation in that it provided detailed cost accounting data by product line basis.

By product line basis, I mean Maxwell House Coffee did not have other brands such as instant coffee or non-coffee products, which are produced and sold by General Foods Company.

App. 625-26.

Thus, Kaplan, qualified as an expert in valuation of businesses, testified unequivocally that the data he relied on in reaching the opinion about which he was to testify was "of a type reasonably relied upon by experts" in the field of valuation of businesses.

At this point in Dean Kaplan's testimony the court permitted cross-examination as to his knowledge of the details of the Federal Trade Commission hearings. That cross-examination in no way impeached Dean Kaplan's testimony that experts in valuation would rely on the materials he relied on in reaching an opinion. App. 627-652.

Walter A. Bissell, a group Vice President of Duff and Phelps, an investment banking firm in Chicago, in charge of the valuation of food companies for that firm, and with many years of experience in that field, gave his opinion as to the control value of Indian Coffee Company, which he equated to fair market value or reasonable value. He, too, testified at length about the information on which valuation experts in the investment banking business would rely. App. 792-813. Bissell examined much of the same data as did Dean Kaplan, and, like him, made inquiries of Mr. Deily, Indian Coffee Company's President, with respect to the kinds of sales volumes that company could maintain with lower promotional allowances. App. 813. His testimony, that he obtained and relied on that information, was properly admitted over objection. Bissell obtained from Mr. Deily marketing information not only about what sales levels could be expected at various levels of promotional allowances, but even about the impact of a blend of coffee appealing to the tastes of people in the marketing area. App. 817. It is quite clear from Bissell's overall testimony that obtaining marketing information from such sources was a normal feature of an investment banker's evaluation process. In asking Deily about marketing, Bissell was relying on information of a type normally relied on by investment banking experts in valuation. Moreover Deily's testimony as to the market share he could obtain at a level for promotional allowances was already in evidence at the time Bissell testified. Exhibits 346 through 352 prepared by Bissell

and reflecting the factors he took into account in expressing his opinions were admitted in evidence. App. 837. Critical was Bissell's opinion that the company's 1970-71 sales volume could have been maintained with a 16 percent expenditure for promotional allowances without any significant loss in sales. When cross-examined, Bissell was asked and answered:

> Q . But you are not giving any professional opinion here today, are you, sir, yourself as to whether or not that underlying assumption is in fact correct or whether that condition would be achievable?
>
> A . Well, let me put it this way. I think we went through this at the deposition. That was Mr. Deily's opinion, and it served as one of our framework assumptions. It was also in my opinion verified by the Folger and Maxwell House data. I will agree that that is a marketing opinion, but in my opinion the assumption is a reasonable one and I wouldn't incorporate it into my analysis if I didn't so consider it reasonable.

When asked if he was giving a marketing opinion he made his position perfectly clear, answering:

> A . Well, I don't want to get into a semantics problem here. I have utilized that assumption in my analysis, and I think I have made clear where I got that assumption. It is my opinion it is reasonable, and I am opining as to value.

App. 840-41. Thus Bissell's cross-examination reinforced his prior testimony that investment bankers making a valuation would rely upon marketing information obtained in the manner and from the sources he obtained the information used in arriving at his opinion. His cross-examination precisely and unequivocally satisfied the requirements of Fed. R. Evid. 703.

Clement H. Darby, a Vice President in the corporate finance group of Girard Bank of Philadelphia, which acts as an investment banker, also testified, as an expert on valua-

tion, as to the fair market value of Indian Coffee Company. He, too, testified at length as to what materials experts in valuation rely upon. App. 987 *et seq.* His method of valuation was to determine the start up costs of a comparable company, using data gathered not only from Indian Coffee Company but from other sources. Arriving at that figure, he expressed the opinion that this amount would be paid for Indian Coffee Company's operating assets by a willing buyer interested in entering the coffee business. His analysis, too, made marketing assumptions; when asked about them he was asked and answered:

> Q . Those are basically Mr. Deily's opinions that you have been asked to accept at face value, is that correct?
>
> A . That is correct, plus my review of an older report prepared by Dean Kaplan which had information in that which was germane to what you are saying.

App. 999. Thus Darby's testimony is consistent with that of the other experts on valuation. Experts on valuation rely, in forming their opinion on the value of a company, on marketing information obtained from the company and from companies they deem comparable.

The record contains no testimony that experts in valuation of companies would *not* rely on information such as that on which Dean Kaplan, Mr. Bissell and Mr. Darby relied in forming their opinions. Nevertheless the trial court struck all the expert testimony on damages. App. 1255-74. In so ruling it made precisely the same error of law that the district court made in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F. Supp. 1313, 1341 (E.D. Pa. 1980). A court may not substitute its judgment for that of experts in the field of valuation as to what marketing data an expert should rely upon in reaching an opinion, for in doing so it invades the province of the jury. The credibility of the experts' opinions on valuation was on this record unquestionably appropriate for resolution by the trier of fact. Indeed there is no evidence casting any doubt on the testimony of the valuation experts that experts rely on the information they relied upon.

The stipulations and Indian Coffee's evidence permit a finding that during the years 1969 through 1972 Indian Coffee Company had achieved a significant market share for its brand, Breakfast Cheer, of about 18% of the market for branded coffee in the Pittsburgh area, its primary marketing area, and a significant but lower market share in the Cleveland area, its secondary marketing area. The evidence would also permit a finding that this share was achieved because of two factors: consumer preference in the Pittsburgh area for a strong coffee flavor, and promotional allowances to grocery chains which, as a percentage of sales was higher than the industry average. The jury could find that during the period in which it was using high promotional allowances to achieve market share for Breakfast Cheer, Indian Coffee Company was nevertheless profitable. Plaintiffs Exhibits 292-300. Indeed that profitability is undisputed, for the financial statements reflecting it were admitted by stipulation. App. 110. There is no evidence from which it could be inferred that, absent the complained of activities of Folger Coffee Company, Indian Coffee Company could not at least have maintained its market share with the same level of promotional allowances as theretofore.

Indian Coffee's evidence also would permit a finding that in marketing branded food products through grocery chains manufacturers resorted to high promotional allowances in order to achieve increased market share and consumer brand acceptance. The evidence would also permit a finding that once brand acceptance is obtained, a manufacturer will normally reduce its promotional allowances to levels closer to the industry average, so as to increase profitability.

James R. Deily, one of Indian Coffee's witnesses, has had many years of experience in selling food products. At the time of his testimony he was President of Fort Pitt Brand Meat Company. He was the sales manager of Oswald & Hess Company, a meat company, when Latrobe Brewery, which had just purchased Indian Coffee, hired him as sales manager for that firm. Eventually he became general manager of Indian Coffee. He was hired for the specific purpose of increasing

sales of Breakfast Cheer Coffee, App. 116, and was successful in doing so. App. 118. Deily's experience in coffee marketing was not confined to Indian Coffee. In 1965 he was hired by Eppens Smith Company, a coffee roaster in Secaucus, New Jersey, owned by Ward Foods, which had both a branded label coffee business in the New York metropolitan area and a private label business. His responsibilities as Chief Executive Officer of that company including marketing. App. 120. From his testimony it could be found that the marketing problems facing Eppens Smith Company were quite similar to those of Indian Coffee. When Deily purchased Indian Coffee in 1966, and once again undertook its management, he found that Breakfast Cheer sales had slipped. App. 123-24.

Deily testified that Breakfast Cheer coffee was blended specifically to satisfy the taste of consumers in the Pittsburgh market. App. 127. The valuation experts found this marketing information to be significant. Typescript, *supra*.

Deily's intention when he purchased the company was to build its sales, and to diversify into other food lines. He testified in detail about the manner in which he achieved the market share which produced the 1969-71 results. App. 128 *et seq*. By the end of 1971 his efforts at achieving market share in Indian Coffee's primary market area produced the result that its product was found in 93% of the grocery stores in that area; second in this respect only to Campbell Soups. App. 137. Deily testified in detail about the importance of "facings" of branded products on supermarket shelves and the fact that such "facings" reflect consumer acceptance in the market. App. 138. He also testified about the marketing significance of supermarket "featuring" of branded staples as a reflection of consumer acceptance and about the fact that, by 1971, Breakfast Cheer was being featured in supermarkets in its primary market area as frequently as, or more frequently than, Maxwell House Coffee, the brand with the largest market share.

Deily explained his marketing strategy:

> It was a small profit, but that was directed in that area because of some of the things I wanted to do with

> employees, I wanted to promote our coffee heavy with promotional activities, I wanted to do a better job with media advertising. I felt rather than have a large bottom line I would much rather plow my money back in the business for growth, and I knew by doing this I could eventually obtain somewhere in the vicinity of 20 percent share of the market.

App. 140. Deily's marketing strategy was obviously successful; by the end of 1971 Breakfast Cheer had facings in 93% of the grocery outlets in the area, and was only about 2% short of his goal of a 20% market share.[3]

Deily's expertise in coffee marketing was recognized by the court; he was permitted, over objection, and correctly so, to express opinions on marketing. *E.g.*, App. 148. He testified at length on how vacuum packed coffee was distributed and marketed, including the vaious promotional devices employed. *E.g.*, App. 154.

Deily testified that for the coffee trade generally, with which he was thoroughly familiar after eleven years as chief executive officer of two separate coffee companies, the normal level of promotional allowances is approximately 14 percent of sales price. App. 160. The levels of promotional allowances made by Breakfast Cheer during the period it was seeking to increase its market share were stipulated. From the fact that the industry generally operated at the promotional allowance level of 14% of sales price, a factfinder could reasonably infer that industry experience was such that this was a level at which the existing market share would be maintained in conditions of lawful competition. Thus even aside from Deily's expertise in food marketing there is evidence from which a factfinder could infer that when

---

[3] It should be noted that Deily's strategy of increasing market share in the Pittsburgh area by high promotional allowances is the same strategy of which he complains about Folger Coffee Company. The difference, however, is that in the case of Indian Coffee there was no geographic discrimination in pricing because Indian Coffee sold in a single market. Thus it could not subsidize its high promotional allowances in Pittsburgh with profits derived elsewhere.

Deily's goal of a 20% market share was achieved, Indian Coffee would be able to maintain it in conditions of lawful competition with promotional allowances at or near the industry average. The stipulated financial statements establish that Deily was close to achieving his desired market share.

But there is more. First, there is Deily's own expert opinion, after years of experience in the business of selling to grocery chains, that once his market share was achieved he could maintain it by promotional levels at or near the industry level. That opinion is not based on speculation, but upon hard practical experience in the coffee industry in which Deily worked, with marketing responsibilities, successfully for years.

Having properly permitted Deily to express his expert opinion on marketing matters, the court later changed position, striking his testimony. Before making that ruling the court invited argument on "[E]xperts relying on improper assumptions." App. 1263. It is quite clear, therefore, that in striking Deily's testimony the court was proceeding in the same misplaced reliance on *Zenith Radio Corp. v. Matsushita Electric Industries Co.*, 505 F. Supp. 1313, 1341 (E.D. Pa. 1980), as when it struck the testimony of Dean Kaplan, Mr. Bissell and Mr. Darby. After hearing argument the court observed:

> Now, Mr. Deily you say was qualified to testify as he did, but he was not offered as an expert. There was no expert report, so his testimony on that has to be the person of a lay person, and under Rule 703, in order to justify the opinion of a lay person, I should say, one must, that the opinion must include the factors upon which it was based, and what did you have here, in general statements such as he was in the business all these years and he worked for the coffee company in New York and so on. That was the basis of his opinion. No details at all. No detailed facts at all. Simply, I am offering my opinion because I have been working in this business since 1960, and I question whether that is sufficient.

> Certainly all the cases cited by the defendant I think stand for the proposition that the unsupported estimates offered as a basis for experts are not sufficient because it is unreasonable for an expert to rely on that kind of evidence or background.

App. 1265.

These observations seriously misstate the record in several respects. First, Deily's testimony was offered and admitted as expert testimony about coffee marketing. Second, his testimony was not merely that he was in business all these years and that he worked for the coffee company in New York. He testified in abundant detail from personal experience about how manufacturers of grocery products obtained facings on supermarket shelves, how they went about increasing market share, how various forms of promotional allowances worked in the supermarket marketplace, the significance of coffee flavor to consumer acceptance, the success of his effort to increase market share, and the level of promotional allowances which the coffee industry in general used to maintain market share. Clearly his expression of the opinion — that when he achieved an increase of market share to 20% he could maintain it with promotional allowances typical in the industry — was rationally based on his own perception over eleven years in coffee marketing, and was helpful to a clear understanding of his testimony or the determination of a fact in issue. Thus even treating Deily solely as a lay witness, his testimony amply satisfies the standards of Fed. R. Evid. 701. *See Teen-Ed, Inc. v. Kimball Intern., Inc.*, 620 F.2d 399 (3d Cir. 1980). Moreover the court apparently was not consciously aware of the standards of Rule 701. Rather, the first and last quoted sentences of its ruling disclose that the court was applying the *Zenith Radio Corp.* misinterpretation of Rule 703. Having misapplied Rule 703 in striking Deily's testimony, the court then struck the testimony of Dean Kaplan, Mr. Bissell and Mr. Darby because they relied on marketing information supplied by Deily, in or out of court, App. 1272, even though their uncontradicted

testimony was that experts such as they, in evaluating companies, relied on projections such as he made. That error was compounded, because those experts did not rely on that source of information alone, but on information such as that obtained from the Federal Trade Commission and the defendants as to what level of promotional allowances was typical in the industry and testified that experts in valuation would rely on such information. In making the ruling the court stated expressly that "it is unreasonable for an expert to rely on this testimony under Rule 702, 3, Rule 403." App. 1272. What we have said about the court's error in striking the testimony of Dean Kaplan, Mr. Bissell and Mr. Darby applies equally to the testimony of Dr. Bodner, who testified as to prospective lost profits as an alternative measure of damages.

Had the opinion evidence been admitted the jury could have found that Indian Coffee's coffee business had a fair market value in late 1971 in the range of $4.2 million and that as a result of Folger Coffee Company's extremely high promotional allowances when Folger entered the Pittsburgh market, its market share, and thus its coffee business, was destroyed. It bears emphasizing that the trial court did not rely on any defect in the proofs with respect to the effect of Folger's marketing activities on Indian Coffee's business. Thus, if as is demonstrated above, the trial court committed legal error in striking the expert opinion evidence on valuation, a new trial is required.[4]

---

[4] Even without the expert opinions on value, there are in evidence financial statements showing that Indian Coffee was operating at a profit from 1969 through 1971. From that evidence alone the attorneys for the plaintiffs could have argued to the jury, had they been permitted to do so, that it could determine value by capitalizing those stipulated earnings. Although the amount of damages testified to by the experts was higher, based on the reasonable assumption that in conditions of lawful competition a 20% market share could be maintained by promotion expenditures typical in the industry, no witness anywhere suggested that absent such a result the business had *no* value, and the evidence that Folger's pricing and promotional allowances caused that value to be lost is abundant.

There is also evidence in the record, consisting of the worksheets prepared by Dr. Bodner, which were not striken, from which the jury could have

(footnote continued on next page)

B.

Other Grounds Relied on are Legally Insufficient

Besides the absence of proof of injury, the trial court articulated alternative bases for a directed verdict. These were that the plaintiffs failed to produce any evidence of harm to competition, as required by *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982), and that they failed to produce any evidence that the injury suffered by Indian Coffee was causally related to Folger Coffee Company's alleged violation of the antitrust laws. App. 93-94. Since either might be a ground for affirmance despite the errors discussed above, we address them briefly.

The antitrust violation alleged is a violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a).[5] Indian Coffee and Folger Coffee Com-

---

determined an amount of future lost profits. While the trial court struck Dr. Bodner's testimony for the same erroneous reason that he struck the testimony of the remaining experts, the worksheets in evidence would permit the jury to calculate lost profits based not on the hypothesis that promotional allowances would be reduced to 14%, but on the hypothesis that they would have remained at the 1969-1971 range.

Judge Stapleton does not join in the views expressed in this footnote.

[5] Robinson-Patman Act, 15 U.S.C. §13(a):

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; Provided, That nothing herein contained shall prevent differentials which make only due allowances for differences

(footnote continued on next page)

pany are primary line competitors. Such competitors injured by geographic price discrimination may recover damages. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536, 542-43 (1960).

In a preliminary ruling on a motion for partial summary judgment the district court, considering what sorts of discrimination in promotional allowances would be considered as "price" discrimination, adopted an extremely narrow definition of price, by excluding from the calculation of price promotional allowances in the form of coupons which could be used by retail customers to obtain price cuts, and by the redeeming retailers as credits against invoices. The court reasoned:

> In this case, while competitive injury may have resulted from Folger's consumer coupon campaign, the geographical price reductions offered by Folger were not to *its purchasers* or customers — the retail grocery outlets — as proscribed by § 2(a), but directly to the ultimate *consumer*, the "buying public," which con-

---

in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or deliverd; Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade; And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

> cededly . . . is not Folger's "purchaser" under § 2(a), and, conduct therefore, not proscribed by § 2(a).

App. at 88-89. The court's approach to geographic price discrimination in the form of credits against invoices for price reductions given to retail customers in the favored market is entirely too narrow. *See Viviano Macaroni Co. v. F.T.C.*, 411 F.2d 255 (3d Cir. 1969). A price discrimination granted to a retailer on condition that he pass it on to a consumer so as to increase the discriminator's share of the geographic market is nevertheless a price discrimination. The effect on a primary line competitor of a discrimination in such a form is identical. Indeed it was the purpose of Congress in passing section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(d), to prevent facile avoidance of the prohibition against price discrimination by framing what is economically such a discrimination in another form.[6] Thus from the beginning of the case the trial court took an unduly restrictive view of the elements of a Robinson-Patman Act violation.

Even with the adoption of an unduly restrictive definition of price discrimination, however, the court admitted plaintiffs' exhibits 604-622 from which a jury could, and probably must, find that in relevant time periods Folger discriminated in price between the Cleveland and Pittsburgh markets, and other geographic areas in which, unlike Cleveland and Pittsburgh, they already had a large share of the market. Thus although the court erred in its preliminary ruling on the elements of the price to retailers, geographic price discrimina-

---

[6] 15 U.S.C. § 13(d):

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

tion still was established. The court therefore did not predicate the directed verdict upon the absence of such discrimination, or upon the absence of predatory intent in making the discrimination. Had a proper price definition been applied, the much greater discriminations reflected in exhibits 13, 273 and 533, marked for identification, but not admitted in evidence, would have been established.

Conceding that geographic price discrimination had occurred, the court held that there was no evidence from which a jury could find harm to competiton, even though the discrimination could be found to have resulted in the demise of a strong regional competitor. In reaching this conclusion the court relied on this court's opinion in *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981). That reliance was misplaced. In *Hommel* the majority refused to characterize the case as one of geographic price discrimination. 659 F.2d at 351. Here the discrimination can be classified in no other way. The relevant market was stipulated. In *Hommel* the plaintiff primary line competitor, during the period when the price discriminations operated, increased revenue from sales, and decreased net losses. 659 F.2d at 342. Moreover, its share of the national market for its product remained stable, as did that of the price discriminator. Here it could be found from the evidence that in the stipulated relevant market a strong regional competitor lost its 18% market share and went out of business. Even assuming the court's erroneous exclusion of certain promotional allowances for the purpose of measuring *discrimination*, the cost of those allowances had to be taken into account for the purpose of determining cost. When they are, it is plain that in the targeted geographic markets Folger's sales prices were below green coffee cost, App. 1409-16, below material cost, App. 1411-20, below material and manufacturing costs, App. 1412-13, 1421-23, below total cost, App. 1414-15, 1424-26, and below marginal cost or average variable cost, App. 1192-93, 1401. Their sales prices were, in other words, below any cost relevent for the determination of predatory pricing on any theory. *See Sunshine Books, Ltd. v. Temple University*, 697 F.2d 90, 92 (3d Cir.

1982). Thus Indian Coffee produced evidence from which the jury could, under the standard of proof announced in *Hommel*, infer predatory intent. 659 F.2d at 348-49. Faced with evidence from which the jury could find the elimination in a stipulated relevant market of a regional competitor holding an 18% market share — actual competitive injury — and evidence of sales below cost from which predatory intent could be inferred, the court erred as a matter of law in directing a verdict because of absence of proof of injury to competition. There is evidence sufficient for either of the methods of establishing such injury discussed in *Hommel*.

The court's third ground for granting the directed verdict is the alleged failure to produce any evidence that the injury suffered by India Coffee was causally related to Folger Coffee Company's alleged violation of the Robinson-Patman Act. As to this ground we are left entirely in the dark on the court's reasoning. The court's citation of *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), does not enlighten. If Folger did violate the Act by geographic price discrimination, Indian Coffee, a primarly line competitor, was plainly within the zone of protection of that Act. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536, 542-43 (1960). Thus the only remaining inquiry is one of proximate cause of injury to business or property. The plaintiffs' burden of proving fact of damage under section 4 of the Clayton Act is satisfied if the illegality is shown to be a material cause of the injury. A plaintiff need not exhaust all other possible causes of the injury to satisfy that burden. *Danny Kresky Enterprises Corp. v. Magid*, 716 F.2d 206, 211 (3d Cir. 1983). That test was amply satisfied in this record, and thus the court committed legal error in granting a directed verdict on the ground that there had been no proof of injury from the Folger Coffee Company's violation of the Robinson-Patman Act.

C.

Conclusion

Since the court committed legal error with respect to all three grounds on which it relied in directing a verdict against Indian Coffee, we will reverse and remand for a new trial on Indian Coffee's claim. The summary judgment against Penn-Western will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5409

INDIAN COFFEE CORP., a Corporation,
and PENN-WESTERN FOOD CORP.,
a Corporation

v.

THE PROCTER & GAMBLE COMPANY, a Corporation,
and THE FOLGER COFFEE COMPANY,
a Corporation

Indian Coffee Corp. and
Penn-Western Food Corp.,
Appellants

(D.C. Civil No. 761-1362)

SUR PETITION FOR REHEARING

Present: SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGENBOTHAM, SLOVITER and BECKER, *Circuit Judges*, and STAPLETON, *District Judge*

The petition for rehearing filed by appellee The Folger Coffee Company in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

---

• Hon. Walter K. Stapleton, United States District Judge for the District of Delaware, sitting by designation.

voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ JOHN J. GIBBONS, Judge

Dated: February 15, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 76-1362

INDIAN COFFEE CORPORATION
and PENN-WESTERN FOOD CORPORATION,
Plaintiffs,

v.

THE PROCTER & GAMBLE COMPANY and
THE FOLGER COFFEE COMPANY,
Defendants.

TRANSCRIPT OF PROCEEDINGS

(The following proceedings were held begining at 10 a.m., April 27, 1983, before Honorable Gustave Diamond, United States District Judge.)

THE COURT: Good morning.

We are here this morning for the court's ruling on the defendant's motion for a directed verdict made under Rule 50(a) of the Federal Rules of Civil Procedure.

In considering such a motion at the conclusion of the plaintiff's evidence, the Court must view all of the evidence and all of the reasonable inferences to be drawn from that evidence in the light most favorable to the plaintiff, and may enter judgment of a directed verdict only where, after viewing that evidence under those standards, the Court concludes that the evidence is insufficient for the jury reasonably to find a verdict in favor of the plaintiff.

In this case, the plaintiff has brought suit under Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act and under section 4 of the Clayton Act to recover damages against the defendant for harm allegedly resulting from geographic price discrimination.

The Act in its pertinent part provides that it shall be unlawful for any person engaged in commerce in the course of such commerce either directly or indirectly to discriminate in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition or to tend to create a monopoly in any line of commerce.

Under the Act, the plaintiff has at least four elements of proof which it must meet and which the jury must find by a fair preponderance of the evidence to exist.

First, discrimination, that there was a geographic discrimination in price.

We have come in this case to accept that that simply means that there was a difference in price offered by the defendant in separate geographic areas or in separate relevant market areas.

Second, that there was actual harm to competition.

Third, that the violation of the Act in fact caused harm to plaintiff's business and for the damages which flow from that harm.

The defendant in its motion contends that the plaintiff has failed to offer sufficient proof from which the jury could find that any of those elements exist in this case. The plaintiff of course argues that there is sufficient evidence from which the jury can find that all of them exist.

The Court has considered the evidence in this case, the briefs of counsel, defendant's brief, particularly, was filed specifically with regard to this motion, but the plaintiff has filed briefs from time ot time on the various issues that have arisen during the trial, some of which apply specifically to this motion.

The Court has considered the plaintiff's briefs, the arguments of counsel yesterday, and having considered that, those matters, the Court is convinced that the plaintiff's case is deficient in at least several of the crucial elements necessary to the establishment of that case, and therefore will direct a verdict in favor of the defendant.

First, we consider the matter of the geographic price discrimination.

The defendant contends that the plaintiff could not establish and has not established geographic price discrimination in this case for several reasons.

One, that in order to establish price discrimination, it is essential that several factors be defined. One, the relevant product line, and, two, the relevant geographic or relevant market.

Up until yesterday, there was a question as to what the relevant product line was, the defendant contending that the product line was coffee, including soluble coffee, the plaintiff contending that the product line was three fold, one, the one, two and three pound cans of regular vacuum packed coffee.

Yesterday counsel for the defendant conceded that so far as the motion was concerned, the matter of whether or not the soluble coffee would be included was a question for the jury, and the plaintiff then elected or stated that the market was not three-fold, but rather regular, vacuum packed coffee.

That created an additional problem, I think, but we will get to that in a second.

The defendant contends that the relevant market is the entire country and cites as a basis for that that the evidence in the case is that Folger supplied its coffee from plants in St. Louis and New Orleans, the plaintiff from Leetsdale, Hills Bros. from Chicago and perhaps someplace in the east, Maxwell House from several locations, and so on, and that the grocers could get their supply from any one of those areas and even the plaintiff indicated that except for his unwillingness or its unwillingness to test other markets, it could have expanded its markets beyond the Pittsburgh area.

Putting aside for the moment whether or not the relevant market is the entire nation, because if it is, obviously there has been no proof of price discrimination in that market, up until yesterday I would have concluded that there was clearly price discrimination demonstrated by the plaintiff because the plaintiff has produced an exhibit which demonstrated that there were lower off-invoices prevalent in the Pittsburgh

and perhaps Cleveland market area during the relevant period than in other areas of the country, certainly for the three-pound can and perhaps if we took the two and the one-pound cans individually, also that could have been demonstrated.

I don't know what we do at this point. Now it seems in order to determine whether there was price discrimination there has to be some complicated mathematical computation in the nature of a weighted average, throwing all the coffee in to one group, six pounds divided by the various off invoices and so forth.

I don't know that there is anything in the record that would permit or from which a jury could have arrived at a conclusion that there was price discrimination under that fact situation.

But, we need not decide if there was price discrimination. That is a matter we can leave open for the Circuit in the event it gets to the Circuit, which I presume it will.

The next element that the plaintiff had to prove is harm to competition, and we believe the evidence is insufficient to demonstrate harm to competition.

Clearly there was no proof of actual harm to competition. There was no market analysis evidence offered by which a conclusion or from which a conclusion or an opinion would have been offered that there was actual harm to competition. There was none of that.

There was no evidence, a La Utah Pie, that there was a decline in the market price structure. In fact, the only evidence offered in that regard demonstrated that there was a steady increase in the prices, at least those charged by Folger.

In addition, all of the testimony audited by the plaintiff from the trade witnesses was that prior to the entry of Folger, the competitive market was sluggish, dormant, live and let live. After the entry of Folger, the market was lively, vigorous, highly competitive, with a great number of promotional and other off invoice allowances and the like.

The only evidence of actual harm to competition might

come from the demise of the plaintiff. We believe as a matter of law that that is insufficient.

Now, I might state at this point we are not purporting at this time to be offering authorities in support of the various statements. We will not be citing cases now. We will subsequently supplement this oral opinion with a bibliography of citations under the various categories. Suffice it for this purpose that where the Court indicates that it concludes as a matter of law that a certain legal principle exists, the Court is relying on authority and the Court will cite authority for the proposition.

There is ample authority for the proposition that the mere elimination of one or more, one, two, three, four, five competitors one of the cases indicated was not in and of itself evidence of harm to competition.

In addition to that, as we will indicate later on the record, there is no evidence from which the jury could reasonably find that the demise of the plaintiff was caused by the anticompetitive or unlawful conduct of the defendant.

Therefore, the Court concludes that there is no actual harm to competition demonstrated, and, on the contrary, the evidence indicates that there was an increase to competition resulting from Folger's entry in to the market in Cleveland in 1971 and Pittsburgh in 1973.

There was no evidence of actual predatory intent from which an inference might be drawn by the jury that there was harm to competition. The only attempt at that was by the plaintiff's offering of the testimony of the one former employee of the defendant, Mr. Strezesal. He testified, I think on balance his testimony can best be characterized as a character witness for Folger and Procter & Gamble, but in any event, on the particular point in question, he testified that not only was there not an active predatory intent to do harm to the plaintiff, but there was in fact active instructions from the district manager, Mr. Knock, I believe, that the sales people for Folger's should make effort not to cause harm to the plaintiff, so there is no evidence on the record at all

from which the jury reasonably could find actual predatory intent.

That leaves us with the so-called double inference possibility. On that we have had a great deal of discussion as to the O'Hommell case in the Third Circuit, Utah Pie, of course. If O'Hommell applies, then clearly the double inference would not be permitted in this case. The double inference in this case would come from the testimony of Doctor Bodnar, who testified that by his analysis of the various records, he concluded and could demonstrate that Folger was selling its coffee at below its green coffee cost.

Accepting the Areeda and Turner guideline or proposition that demonstrating that a product was sold at below average variable cost, this is evidence of predatory intent, that would be sufficient for the jury in this case to find predatory intent, from which they could find harm to competition.

The defendant argues that, first of all, well, for several reasons we shouldn't follow that. One, there has been no demonstration in this case that the preferable cost analysis was unavailable, namely, a demonstration that the defendant was selling below average marginal cost or incremental cost or whatever, and, two, that Doctor Bodnar's analysis is flawed in his failure to give adequate consideration to LIFO, FIFO, and all of those things.

I think the latter certainly goes to the weight to be given to his testimony, and the Court has concluded that as a practical matter, it would be sufficient in the facts of this case to demonstrate sales below average variable cost.

The problem that the Court finds, however, is that after much reading, rereading and analyzing, the Court believes that O'Hommell applies in this case.

The Court in O'Hommell indicated that evidence of predatory pricing would not be admissible where, one, there was — It isn't absolutely clear whether the Court was stating that there is an absence of proof that there was actual harm to competition or where there is proof that there was no harm to competition.

Under either standard, this Court concludes that that prong is met in this case because the evidence demonstrates certainly that there was no harm to competition, and, secondly, it appears that the evidence points to the fact that competition was enhanced affirmatively, and therefore that prong is met.

The other prong is that in order to have predatory pricing come in to effect at all, there must be a demonstration that the predator had the ability or potential ability to acquire monopoly or monopoly-like market powers so that therefore it could recoup by supra-normal profits the investment made through its predation, and that wasn't even attempted to be shown here, and of course all the evidence is to the contrary.

The dominant factor in the market was General Foods and there is absolutely no indication that Folger had any ability to obtain a monopoly position in the market so as to acquire any reasonable expectation or to justify any reasonable expectation that it could subsequently recoup losses by supra-normal profits.

Applying those factors, then it would appear that the plaintiff was not entitled to the double inference standard. However, there is still a distinction between O'Hommell and our case. O'Hommell, and the Court stated this on several occasions, was a selective price discrimination case as opposed to a geographic price discrimination case.

While the Court offered that as a distinction between O'Hommell and Utah Pie, there is no indication that the Court indicated that that was a relevant, significant factor in the second prong of the O'Hommell thesis, and that is that in order to show predation you must be able to show the ability to acquire monopoly power. They were quite I think absolute in the development of that thesis.

In any event, the Court believes that O'Hommell applies and therefore that there is no evidence from which the jury could find harm to competition.

We get next then to harm to the plaintiff, and this is where I believe that the case of the plaintiff is most clearly and unquestionable deficient. This is a price discrimination case.

Aside from the esoteric argument offered by Mr. Beatty with regard to price discrimination and the fact of price discrimination having to be the causal factor of the harm and that there must be an in demonstration that the lower price in one area was subsidized by a higher price in another area, despite that esoteric argument, and I call it esoteric simply because I don't quite understand it, the evidence nevertheless demonstrates or fails to demonstrate that there was any harm resulting to the plaintiff from the prices charged by the defendant Folger in the Pittsburgh market area, and again for the moment we are not making determinations as to whether or not the Pittsburgh market area is the relevant market area. We are assuming that it is, and therefore not agreeing with the defendant for this purpose and so the defendant on cross appeal certainly would, I presume, have that argument available to it, but we are accepting that the relevant product line is coffee, regular vacuum packed coffee, and I suppose the unit would have to be the one-pound unit at this point, averaged down to one pound.

There is no evidence from which the jury could find that, one, Folger's charged lower prices than any other competitor in the Pittsburgh area, prices as, first of all, prices as defined by the court, being list less off invoice and any other billing type allowance, but, moreover, there is no evidence from which the jury could find that Folger charged lowered net prices in the Pittsburgh area than the other competitors.

There is no evidence that the plaintiff lost any sales as a result of a one-on-one competitive challenge involving Folger and the plaintiff.

None of the witnesses offered by the plaintiff, none of the trade witnesses even suggested that, nor did Mr. Deily.

There is no evidence as to what price by any standard anyone else charged in the Pittsburg area. There was some evidence proffered by the plaintiff on the last day of trial as to what Hills prices might have been, but they were in the form of a bulk exhibit and no indication that it would be possible for a jury to extrapolate or to extract from that exhibit what the prices were of Hills, plus the fact that by stipulation there

was no indication as to when those prices went in to effect, so that would be insufficient for the jury to conclude even that Hills was higher or lower thatn the defendant Folger.

In order for there to be proximate legal cause, there must be, first of all, logical cause. There must be a logical relationship between the harm and the complained of conduct. That is true in personal injury cases. It is true in any other situation where one is attempting to demonstrate a cause and effect relationship. I don't know what the Larin expression is, but there is an expression that it follows from, therefore it is caused by, and that being a flawed logical concept. In this case, I think that is what we have. We have plaintiff going out of business or suffering business failure after the entry of Folger, therefore contending that the entry of Folger was the causal factor in the demise. It does not follow, and it certainly does not follow in this case from the evidence that any harm suffered by the plaintiff was harm caused by unlawful activity of Folger.

The plaintiff failed to demonstrate what the prices were that Folger was charging in the Pittsburgh area as compared to similar prices by other competitors in the area — Maxwell House, Breakfast Cheer and Hills Bros. and so forth.

There is no indication on the record that Folger even led in price decline for the reason that even the testimony of the trade witnesses which purported to offer the opinion that Folger led were talking in terms of dead net. They were not talking in terms of the off invoices and billing allowances, so there was an absolute absence of proof that there was harm resulting from the conduct, unlawful conduct, of Folger, and we mention only in passing that there were so many other factors that could have been involved, that were involved, that it would make it further logically untenable to argue that Folger's was the cause of plaintiff's demise, but that is not the basis for the opinion or the ruling.

We are ruling now on sufficiency of the evidence, and viewed in the light most favorable to the plaintiff, there is an absence of proof on the subject of causation.

Finally, we get to the question of damages. The plaintiff

sought to prove damages by the testimony of its experts and by the testimony of the plaintiff himself, or by Mr. Deily, the president of the plaintiff corporation.

The testimony of the expert witnesses was stricken to the extent that they relied on the opinion of Mr. Deily that his company could reduce their percentage expenditures for promotional allowances from 22 or 23 percent on down to 14 or 16 or 14 percent, I believe.

The Court indicated the basis for its ruling. It is the court's ruling was a 703 ruling that it is unreasonable, it was unreasonable for the experts to rely on that kind of an opinion and therefore one of the elements necessary under Rule 703 for the rendering of an expert opinion was absent.

In addition, but not dispositive, the rule was made on 703. There are 403 objections as well, and the Court cited the various cases on which it based its opinion, Zenith, Litton, Pensi, Seagrams, and others.

The Court left open, and if there is any question on the record at this point, we will close it, the question of Mr. Darby.

Mr. Darby didn't rely on the 14 percent as such, but he clearly relied on the opinion that Breakfast Cheer could reduce its expenditures for promotion allowances down and nevertheless maintain its market position, and to the extent that his opinion was based on that, that also is stricken.

Now, those witnesses had testified variously on loss of profits and the value of the business, the assets of the business, as of December 31, 1971, December 31, 1972, I believe.

That left us with the testimony of Mr. Deily. Mr. Deily testified that in his opinion his company was worth four and a half million dollars as of December 31, 1971. He broke that down in to various factors, the value of the institutional coffee which was six hundred seventy thousand dollars, I believe, the value of the profit structure based on again a reduction down to 14 percent which amounted to a nine percent reduction from 23 down to 14 and multiplied by sixty thousand, they come up with five hundred forty thousand dollars for that, plus an opinion it cost Folger two and a half

million to come in the Pittsburgh area, he already was in the Pittsburgh area and therefore that was worth two and a half million, and I believe some value for the physical plant and equipment.

We believe then that that testimony also is deficient, principally because, one, it is as of December 31, 1971, and the plaintiff has admitted that they have offered no proof of any price discrimination prior to I think January 1973, so their case must start from January 1973.

That leaves a full year. As the evidence developed, that was an eventful year for Breakfast Cheer. They lost considerable sales as a result of a strike of Thorofare, as I recall, and considerable sales also because of Kroger's concentration on private label product, but in any event, what we are left with is the situation where now the jury is required to take that figure and come up with a number, and there is no guidance in the record from which the jury can do that.

In other words, they would be speculating. This was found to be inappropriate in a number of cases. Pensi comes to my mind, Judge Rambo, and various other cases cited by the plaintiff, I believe perhaps Coleman in the Circuit, but there are others. Therefore, the evidence on damages is fatally deficient.

The defendant has offered various other grounds as bases for the granting of the judgment, the directed verdict. The Court isn't going to rule on those at this time. It seems to the Court clear enough that the plaintiff failed in the most basic part of its case, namely, to prove that there was harm resulting from price discrimination, call it low prices, failure to demonstrate that, and certainly there was a failure to demonstrate that there was harm resulting from price discrimination in the sense that Mr. Beatty argued that it should be, and the Court specifically finds that, so if the Circuit can understand that argument, then the Circuit will not have to wonder what the Court's feeling is about it.

If that is a valid argument, there has been, and the Court concludes there is no evidence from which the jury could find that there was a subsidation of the Pittsburgh prices by the

prices in other areas and that there was harm resulting from the fact, quo fact, of discrimination. There isn't that. I don't know why that should be necessary, but the Circuit will have plenty to do. This will be one other item for them to consider.

In any event, for the foregoing reasons the Court will grant the defendant's motion for a directed verdict.

Bring in the jury.

I might also state on the record that as a matter of philosophy and the law, where it is clear that a plaintiff has not made out a case, it is the obligation of the Court to direct a verdict.

There are logistical reasons sometimes for permitting a case to go to term. I can not believe that that would have added anything to this case. Assuming it would have gone to term and the jury would have found for the defendant, the plaintiff still has the arguments with regard to the Court's various rulings on price and so forth.

In any event, the Court recognizes that the defendant's case would have taken an additional several weeks, according to the projections of counsel, that it would have taken several weeks, and obviously a great deal of money and expense, to say nothing of the time of the jury, the time of the Court to try this case to the jury.

If there were questions in the mind of the Court as to the sufficiency, we would have then let it go. There was no question in the mind of the Court, and therefore it seems we have no other choice but to render the verdict or the judgment, and the fact this is an antitrust case doesn't change that.

We will enter the judgment today and we will supplement with the citations of authority on which we rely, and if we have any additional thoughts, we would reserve the right to include them in a memorandum, but in any event, judgment will be entered as of today and the time for appeal will begin to run as of today. You have 30 days.

I think once the notice of appeal is filed, the Court is deprived of jurisdiction. I don't think that prevents the Court nevertheless from supplementing, and we reserve the right to do that. We may get in to chambers and decide we want to start our life over again with something else.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-1362

INDIAN COFFEE CORPORATION,
Plaintiff,

v.

THE FOLGER COFFEE COMPANY,
Defendant.

MEMORANDUM ORDER

AND NOW, this 29th day of April, 1983, the defendant having filed a motion for a directed verdict at the conclusion of the plaintiff's case in the trial of the above-captioned action; and, on the 27th day of April, 1983, the Court having ordered that said motion be granted and that judgment be entered for the defendant, The Folger Coffee Company and against the plaintiff, Indian Coffee Corporation for the reasons set forth and transcribed on the record in open Court on April 27, 1983;

IT IS ORDERED that the Court's oral reasoning in support of its ruling be, and the same hereby is, supplemented with the following legal authority:

1.) Standard for granting directed verdict

— *Edward J. Sweeney & Sons, Inc. v. Texaco,* 637 F.2d 105, 115 (3d Cir. 1980);

— *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 25 (3d Cir. 1978), *cert. denied,* 439 U.S. 876 (1978);

— *Patzig v. O'Neil,* 577 F.2d 841, 846 (3d Cir. 1978).

2.) Plaintiff's failure to demonstrate harm to competition

a.) no triable issue exists where plaintiff's only evidence of harm to competition is that it was replaced in the market by defendant

— *O. Hommell Co. v. Ferro Corp.*, 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982);

— *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978);

— *Worldwide Marine Trading Corp. v. Marine Transport Service, Inc.*, 545 F.Supp. 156, 162 (E.D.Pa. 1982).

b.) Where there is no proof of actual competitive harm and what proof there is indicates that competition increased after defendant's actions, it is impermissible to permit the jury to infer harm to competition from evidence of below cost sales.

— *O. Hommell*, 659 F.2d at 347-53.

3.) Plaintiff has failed to show any evidence tending to show that its injury was causally related to defendant's alleged violation of the antitrust laws.

— *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977);

— *Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 255 (3d Cir. 1980), *cert. denied*, 452 U.S. 905 (1980).

4.) Plaintiff's damages evidence is insufficient.

a.) The evidence of lost profits and business valuation offered by Messers. Kaplan, Darby, Bissell

and Bodnar is based impermissibly, on the opinions of plaintiff's president, Mr. Deily.

— *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975);

— *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575 (5th Cir. 1982);

— *Zenith Radio Corp. v. Matsushita Electrical Industrial Co.*, 505 F.Supp. 1313, 1341 (E.D.Pa. 1980)[1];

— *American Bearing Co. v. Litton Industries, Inc.*, 540 F.Supp. 1163; 1173-4 (E.D. Pa. 1982);

— *R.S.E., Inc. v. Pennsy Supply, Inc.*, 523 F.Supp. 954, 963-6 (M.D.Pa. 1981);

— *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 392 (6th Cir. 1962).

b.) The damage estimates of Mr. Deily do not form the basis upon which a jury can render an award.

— *Coleman, supra*;

— *Pennsy, supra*.

/s/ GUSTAVE DIAMOND
United States District Judge

cc: All counsel of record.

---

[1] The Court in applying the six factors enunciated by Judge Becker in *Zenith* finds that the testimony offered here falls within categories 3 and 6 and thus is "pervaded with reliance upon unreliable sources." *Zenith*, 505 F.Supp. at 1330.

STATUTES INVOLVED

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), in pertinent part:

§ 13. **Discrimination in price, services, or facilities**

(a) Price; selection of customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

Section 4 of the Clayton Act, as amended, 15 U.S.C. § 15(a), in pertinent part:

§ 15. **Suits by persons injured**

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

EXCERPT FROM THIRD CIRCUIT APPENDIX
at 481a

Q Mr. Deily, the question was what was the percent of trade promotions as just defined from the revenue of sale of branded and private label coffee?

A Approximately 23 percent.

Q And what was it in 1971?

A In the same area.

Q Approximately 23 percent?

A Yes, sir.

EXCERPT FROM THIRD CIRCUIT APPENDIX
at 486a-487a

Q What did you consider at Breakfast Cheer a normal promotion allowance?

A 14 percent.

* * *

Q Mr. Deily, assuming a 14 percent normal promotion allowance figure, what effect would that have had on the profits for the year 1970?

A There would have been an increase in profits.

Q Of what amount, sir?

A The difference of nine percent at sixty thousand dollars on each percent would be five hundred forty thousand dollars.

Q How about the year 1971?

A It would be the same area.

EXCERPT FROM THIRD CIRCUIT APPENDIX
at 494a-495a

Q Now, Mr. Deily, do you have an opinion as to the value of the operating assets business of Breakfast Cheer Coffee Company as of the end of 1971?

A Yes, sir.

Q What is that value?

A Four and a half million dollars.

EXCERPT FROM THIRD CIRCUIT APPENDIX
at 532a

Q . . . After Wechsler decided to consolidate the Breakfast Cheer manufacturing operations in New Jersey, they continued to manufacture Breakfast Cheer at that location, did they not?

A At what location?

Q In New Jersey.

A They took whatever volume was left and put in into that plant up in New Jersey somewhere, yes.

Q And they continued thereafter to ship Breakfast Cheer back into Pittsburgh and sell it in this area; correct?

A Whatever was left of it. They did a little of that, yes.

EXCERPT FROM THIRD CIRCUIT APPENDIX
at 533a-536a, 558a-559a

Q Now, Mr. Deily, are you testifying that you felt that you could reduce the amount of money that your company spent on bill back promotions from 23 percent to 14 percent and still maintained your same volume and income; is that your testimony?

A No. What I said — Mr. Beatty, what I was referring to, for each one percent that we would reduce our promotion allowance, that would bring $60,000.00 down to the bottom

line. . . . I believe that with our position in the market, our distribution, consumer acceptance, we were to the point where we could have started to back off one or two or three or four or five percent . . . and that was our intention and that is what I was saying.

* * *

Q Are you telling us that you think, in your opinion, that in your sales area, in 1973 and '74, '72, you could have reduced the amount of money that you were spending for promotions from 23 percent to 14 percent of your company's income and still maintained your sales and share?

A Mr. Beatty, you keep talking about the 14 percent. I didn't say I would cut back that far. What I am saying is that I could have reduced it by — each one percent would have meant $60,000.00 to the bottom line. Let's say I just reduce it down to 18. That is $300,000.00 brought to the bottom line. That is what I am saying. . . .

Q You are not saying then you could go all the way back to 14 percent and still maintain your position, could you?

A Mr. Beatty, it would be foolish for me to sit here and tell you that I could go from 23 to 14 overnight. It would have to be done in degrees. I would try. If I could do it for one percent less, two percent less, yes. That is what I am saying. I am not saying I could have done it for 14 overnight, no, sir, and I don't think I said that.

* * *

Q Now, to translate this into very simple terms that I think maybe we can all understand, when you are talking about reducing the percentage of your company's income that you spend for promotions, what you are really talking about is reducing the amount of the allowances and raising your dead net price; is that correct?

A Reducing the amount of the allowance, yes, sir.

Q And that, of course, translates immediately into raising your dead net price somewhat; correct?

A Yes.

Q And to put this in even simpler terms, what you are telling us is given all the competitive conditions in this highly competitive marketplace, you felt you could raise your dead net price and still get the kind of featuring and sales that you needed to maintain your volume?

A In 1971, yes, sir.

* * *

Q Now, just five minutes ago I think you told Mr. Laubach in answer to a question that it was your opinion that you could maintain your market share while reducing your overall commitment of corporate funds for the support of promotions to a level of 14 percent. Now, I also thought that just this morning you told me that there was no way you could do that; isn't that true?

A Mr. Beatty, I didn't say that I could maintain that level of 14 percent. What I had said, we had a promotion factor of 22 to 23 percent, that I had hoped to be able to reduce that by degrees, one percent, two percent, three percent, eventually I had hoped to get to the 14 percent number, and it was in my opinion that under normal market conditions that existed prior to the competitive situation after the arrival of Folger's that I could have done this. That is what I said.

EXCERPT FROM THIRD CIRCUIT APPENDIX

at 1264a-1265a, 1272a-1274a

THE COURT: . . . When all of the smoke is cleared and when all of the qualifications of the experts are discounted and we get down to it, the fact of the matter is that the damages in this case boils down to the testimony of Mr. Deily that he could maintain his market position, assuming that was his testimony, he could maintain his market position by 14 percent, and therefore each percent represents sixty thousand dollars and just multiply the number of percent, pick a

percent between 23 and 14, give that sixty thousand dollars worth of value and then take the multiplier and that gives you the damages in this case.

* * *

THE COURT: . . . [T]o the extent that an expert relied on the statement in or out of court of Mr. Deily and/or counsel for the plaintiff's with regard to the 14 percent, the ability of the company to operate at a promotion level at 14 percent and still maintain market position, the testimony will be stricken for the reason, one, that under the stated cases, and I won't attempt to cite them all at this point, but the Seagrams case, the Litton case, the Sennet case, the Velasco case and virtually every other case cited by the defendant in its brief, this type of testimony, the Penski case, the Coleman case in the Circuit, this type of testimony is unreasonable, it is unreasonable for an expert to rely on this testimony under Rule 702, 3, Rule 403. It would, I believe under Rule 403 and under Rule 401, depending on the approach that is taken, this testimony would confuse the jury, is virtually irrelevant, but particularly that it is an unreasonable type of testimony for an expert to base his opinion on here.

Mr. Deily did not state, except in very terms the basis for his conclusion, and when cross examined, it was clear that he was not indicating that he held the opinion that this was, that 14 percent was a realizable goal for his company, only that this is what his ambition and hope was, and that his plan was to in effect test the waters with a gradual one percent, two percent cut back to see what see what would happen, and in the event that the other competitors in the market were to attempt to take advantage of this, he would then presumably be forced to return to his previous level of promotion allowances in order to maintain his market position.

In addition, it is clear certainly with regard to the lost profits that the experts accepted this number as an immediately realizable figure and based their statements as to lost profits for the years 1972 and 1973 on the assumption that the level

of profitability in a "normal" market or a market not tainted by the unlawful activities of Folger would have been 14 percent promotion, and based further on the statement of Mr. Deily that the percent equaled sixty thousand dollars and with that, then it became a simple matter of basic arithmetic to multiply the chosen reduction and promotion percent to sixty thousand dollars per percent point.

The assumption of Mr. Deily does not take into consideration at all not only the lawful activity of the entrant, Folger's, but the activity of the predominant market shareholder, General Foods, Maxwell House, and perhaps even more importantly the reaction of the Hills and Chase & Sanborn to the opportunity to increase their market share at the expense of Breakfast Cheer.

It doesn't take in to consideration, and virtually ignores the testimony of Mr. Deily and virtually every other witness, this is a price sensitive market and that the factor which most influenced a grocer in to purchasing coffee was the bottom line, the net, the dead net.

For that reason, the testimony does not have the type of trustworthiness, the minimal trustworthiness necessary as a basis for the formulation of an expert opinion and consistent with the holdings in the cases that are cited, the Court will exclude that testimony.

PLAINTIFF'S EXHIBIT 287
Revised

MOVEMENT OF COFFEE FROM WAREHOUSES

Pittsburgh Market Area

Period Ended	Breakfast Cheer			Folger		
	Prior 4 Weeks		Prior 52 Weeks	Prior 4 Weeks		Prior 52 Weeks
	Cases	Share		Cases	Share	
Nov. 24, 1972	14,320	18.3	13.5	423	.5	.5
Dec. 22	10,669	14.5	13.2	494	.7	.5
Jan. 19, 1973	8,706	13.9	13.4	355	.6	.5
Feb. 16	4,453	7.6	12.6	477	.8	.5
Mar. 16	13,279	18.0	13.1	316	.4	.5
Apr. 13	10,852	14.0	12.1	3,443	4.5	.9
May 11	5,490	6.7	11.4	18,986	23.2	3.0
June 8	8,441	14.2	11.5	5,608	9.4	3.7
July 6	2,917	5.8	11.4	4,796	9.6	4.2
Aug. 3	5,047	9.5	11.0	7,122	13.4	5.1
Aug. 31	8,165	11.0	11.2	4,779	6.4	5.4
Sept. 28	7,158	9.1	11.4	11,553	14.6	6.6
Oct. 26	784	.8	10.8	18,741	18.3	8.3
Nov. 23	3,294	4.6	9.7	5,286	7.4	8.9
Dec. 31	1,200	1.6	8.7	6,659	9.1	9.6
Jan. 18, 1974	779	1.3	7.8	8,395	13.8	10.5
Feb. 15	863	1.2	7.3	12,326	16.6	11.6
March	780	.8	5.8	9,632	9.9	12.3

PLAINTIFF'S EXHIBIT 350

THE INDIAN COFFEE CORP.
COMPARATIVE STATEMENT OF INCOME AND RETAINED EARNINGS
Years Ended December 31, 1966-1973
(In 000's)

	1973	1972	1971	1970	1969	1968	1967	1966 a
Net sales	$3,710	$5,583	$7,035	$7,235	$4,918	$4,996	$4,613	$1,900
Cost of sales	2,744	3,946	4,885	5,004	3,467	3,595	3,530	1,491
Gross profit	966	1,637	2,150	2,231	1,451	1,401	1,083	409
Selling and administrative expenses	1,126	1,580	2,021	2,064	1,304	1,253	945	353
Operating income	(160)	57	129	167	147	148	138	56
Other income	42	24	67	31	20	6	6	4
	(118)	81	196	198	167	154	144	60
Discounts allowed and other expense	53	79	117	112	81	80	69	23
Interest expense	61	52	63	47	50	34	45	17
Income before income taxes	(232)	(50)	16	39	36	40	30	20
Provision for income taxes	(10)	(15)	6	17	14	16	8	3
Net income before life insurance	(222)	(35)	10	22	22	24	22	17
Life insurance, net	(5)	4	9	6	8	8	0	0
Net Income (Loss)	$ (217)	$ (39)	$ 1	$ 16	$ 14	$ 16	$ 22	$ 17
Depreciation and amortization included above	$ 21	$ 21	$ 25	$ 19	$ 22	$ 18	$ 22	$ 8
Retained Earnings								
Balance, beginning of period	$ 47	$ 86	$ 85	$ 69	$ 55	$ 39	$ 17	$ 0
Net income (loss)	(217)	(39)	1	16	14	16	22	17
Balance, end of period	$ (170)	$ 47	$ 86	$ 85	$ 69	$ 55	$ 39	$ 17

a Covers period July-December, 1966.

Source: Audited financial statements (1966-1972). Unaudited financial statements (1973).

THE INDIAN COFFEE CORP.
SALES TONNAGE DISTRIBUTION
(000 lbs.)

	1973	1972	1971	1970	1969	1968	1967
Breakfast Cheer	2,338	4,436	5,980	6,124	5,028	5,390	4,694
Private Label	164	239	649	1,066	726	775	1,257
Institutional	806	708	648	652	717	742	706
Total Tonnage	3,308	5,383	7,277	7,842	6,471	6,907	6,657

Source: Dr. George Bodnar's Report.

EXCERPTS FROM PLAINTIFF'S EXHIBIT 354

PITTSBURGH	'73 A/M
Folger	9.9
Maxwell House	44.0
Max Pax	1.8
Hills Bros.	6.2
Chase & Sanborn	8.0
Sanka	4.0
Private Label	14.3
All Others	11.8
Total Industry	100.0

PITTSBURGH MONTHLY DATA

	May	June
Folger	8.9	11.0
Maxwell House	45.0	38.7
Max Pax	1.9	2.3
Hills	6.0	17.4
Chase & Sanborn	7.1	5.4
Sanka	4.6	3.9
Brim	1.7	1.4
Breakfast Cheer	8.9	1.8
Horizon	--	--
Yuban	0.1	0.1
Private Label	12.7	NA
All Others	3.1	18.0
Total Industry	100.0	100.0

PLAINTIFF'S EXHIBIT 544A

PITTSBURGH

Regular Coffee

Shares - Warehouse Movement

52 Weeks Ending	Breakfast Cheer	Folgers	Maxwell House	Chase & Sanborn	Hills	Private Label
April 14, 1972	17.8	0.3	35.2	7.2	9.3	24.6
December 22, 1972	13.2	0.5	36.9	5.8	8.7	26.3
July 6, 1973	11.4	4.2	38.4	3.9	7.7	24.2
December 21, 1973	8.7	9.6	44.8	3.3	7.1	17.6
March 15, 1974	5.8	12.3	48.7	2.9	6.5	15.3

DEFENDANT'S EXHIBIT 849
(FACSIMILE)

CAPITAL STOCK VALUE

1966	80,000
1967	105,000
1968	140,000
1969	160,000
1970	160,000
1971	160,000
1972	150,000
1973	5,000

DEFENDANT'S EXHIBIT
849

(FACSIMILE)

Office-Supreme Court, U.S.
FILED
JUN 13 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1796

In The

Supreme Court of the United States

October Term, 1984

THE FOLGER COFFEE COMPANY,

Petitioner,

v.

INDIAN COFFEE CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS P. RAVIS, ESQ.
Counsel of Record
992 Perry Highway
Pittsburgh, Pennsylvania 15237
(412) 367-7271
Attorney for Respondent
INDIAN COFFEE CORP.

Of Counsel:
FRANK R. FLEMING, III, ESQ.
HOUSTON HARBAUGH
Two Chatham Center
Twelfth Floor
Pittsburgh, Pennsylvania 15219
(412) 281-5060

COCKLE LAW

BEST AVAILABLE COPY

COUNTER-STATEMENT OF QUESTIONS PRESENTED

In this litigation, now almost nine years old, Indian Coffee Corp. ("Indian Coffee") charges Folger Coffee Company ("Folger") violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. 15 U.S.C. Section 13(a). Indian Coffee alleges that Folger, a large, multi-market, financially powerful coffee manufacturer, entered the local Pittsburgh market (as well as Cleveland); for a year in Pittsburgh and longer in Cleveland it offered increasingly large allowances (much greater than those in other areas) to the grocery trade to encourage purchase of its coffee; it caused the amount paid by the grocer to be less than the cost of producing and delivering the coffee; it created a market dominated by itself and another large multi-market coffee manufacturer, a market in which all other competitors suffered severe reductions in market share, sales and competitive vigor; and it forced Indian Coffee, the only local competitor (with the #2 market position in Pittsburgh) out of business altogether because it could not compete with the long continued below cost selling.

The Court of Appeals for the Third Circuit unanimously reversed the trial court's directed verdict against Indian Coffee entered at the end of its case. The questions arising out of that judgment are essentially factual in nature and may be stated as follows:

1. Whether the Court of Appeals was correct in ruling admissible Indian Coffee's uncontradicted expert opinion evidence on valuation, based on data which the experts attested without contradiction was of a type reasonably relied upon by experts in their fields, and in con-

sidering such evidence together with other direct and circumstantial evidence in holding that a directed verdict was improper in this case.

2. Whether the Third Circuit was correct in holding that a directed verdict was improper in this case where the factual record contains evidence from which a jury could find harm to competition where the Indian Coffee had shown both actual competitive injury and evidence of sales below cost from which predatory intent could be inferred.

3. Whether this Court should reassess the factual record to determine if the Third Circuit was correct in ruling that a directed verdict was improper where Indian Coffee had provided sufficient evidence to show that the injury it suffered was causally related to Folger's alleged violation of the Robinson-Patman Act.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

COUNTER-STATEMENT OF THE CASE 1

A. Nature of the Case and Procedural History 1

B. Statement of the Facts 3

REASONS FOR DENYING THE PETITION

INTRODUCTION 12

I. INDIAN COFFEE PROVED DAMAGES 13

II. THE FACTUAL RECORD CONTAINS EVIDENCE FROM WHICH A JURY COULD FIND HARM TO COMPETITION WHERE INDIAN COFFEE HAD SHOWN BOTH ACTUAL COMPETITIVE INJURY AND EVIDENCE OF SALES BELOW COST FROM WHICH PREDATORY INTENT COULD BE INFERRED 15

A. Potential Monopoly Power Is Not Essential To Establishing Predatory Pricing In A Robinson-Patman Case. 17

B. New Entrants Are Not Immune From Robinson-Patman Act Liability. 18

C. Indian Coffee Offered Evidence From Which A Jury Could Find Harm To Competition From Folger's Geographical Price. 20

III. THE COURT OF APPEALS' RULING ON THE ADMISSIBILITY OF EXPERT OPINION EVIDENCE UNDER RULE 703 OF THE FEDERAL RULES OF EVIDENCE WAS CORRECT AND DOES NOT WARRANT REVIEW BY THIS COURT. 23

CONCLUSION 28

TABLE OF AUTHORITIES

CASES: Page

Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), cert. denied, 363 U.S. 543 (1960) 21

Ben Hur Coal Co. v. Wells, 242 F.2d 481 (10th Cir.), cert. denied, 354 U.S. 910 (1957) 16

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 15

Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 97 (10th Cir. 1973), cert. denied, 414 U.S. 975 (1973) 16, 21

Dean Milk Co. v. FTC, 395 F.2d 696 (7th Cir. 1968) 19, 20

Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874 (1st Cir. 1966) 27

FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960) 12

Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir. 1973) 27

Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976) 26

Lloyd A. Fry Roofing Co., 68 F.T.C. 217 (1965), aff'd., 371 F.2d 277 (7th Cir. 1967) 16

Malcolm v. Marathon Oil Co., 642 F.2d 845 (5th Cir. 1981) 15, 18, 25, 27

Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954) 12

National Dairy Products Corp. v. FTC, 412 F.2d 605 (7th Cir. 1969) 16, 19, 20

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) 27

Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16 (5th Cir. 1974) 27

Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967) 16, 17, 20, 21, 22, 23

TABLE OF AUTHORITIES—Continued

Page

STATUTES AND RULES:

Clayton Act, 15 U.S.C. Section 15 13

Robinson-Patman Act, 15 U.S.C. Section 13(a) 1

Rule 703, Federal Rules of Evidence 23

Sherman Act, 15 U.S.C. Section 2 17

OTHER AUTHORITIES:

4 Van Kalinowski, Antitrust Laws and Trade Regulations (1983) 16

A.B.A. Antitrust Section, Monograph No. 4, The Robinson-Patman Act: Policy and Law, Vol. 1 (1980) 12

COUNTER-STATEMENT OF THE CASE

A. Nature of the Case and Procedural History.

This civil action was brought in October, 1976 by Indian Coffee Corp. ("Indian Coffee") against The Folger Coffee Company ("Folger") seeking treble damages for violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. Section 13(a). A primary line case, it involves geographical price discrimination in the sale of regular vacuum packed coffee ("coffee") to the grocery trade from late 1971 through early 1974, first in the Cleveland market area and later in the Pittsburgh market area as well.

Consideration of Folger's unmeritorious summary judgment motions, extensive discovery and Folger's equally unmeritorious pretrial evidentiary objections, consumed over six years. All of this time, expense and judicial effort delayed Indian Coffee in having a trial until 1983.

A jury trial began March 24, 1983, and continued to April 27, 1983, before District Court Judge Gustave Diamond. Several days into the trial, the District Court, for the first time, defined price for Section 2(a) effectively as list price less off invoice allowances (1-337a, 338a).[1] On April 27, 1983 at the close of Indian Coffee's evidence, a directed verdict was entered for Folger (36A) on the grounds that Indian Coffee had failed to establish harm

---

1. References to the Petition for the Writ of Certiorari are abbreviated "Pet. ———". Page references to the Appendix to the Petition are given in the form "——A". Page references to the Appendix in the Court of Appeals are given in the form "——a". A copy of the Appendix filed in the Court of Appeals is lodged with the Office of the Clerk, Supreme Court of the United States, for the convenience of the Court.

to competition, had failed to show that its injury was causally related to Folger's geographical price discrimination, and had failed to establish damages to Indian Coffee (25A-36A).

Indian Coffee appealed to the Third Circuit Court of Appeals from the entry of the directed verdict against it and all related subsidiary issues, and the refusal to admit certain evidence, including expert opinions on the value of Indian Coffee's business and other exhibits related to trade allowances and Indian Coffee's price contentions.

The Court of Appeals for the Third Circuit on January 15, 1985 unanimously reversed the directed verdict and remanded the case for a new trial. A panel of the Court of Appeals comprised of Circuit Judge John J. Gibbons, Circuit Judge James Hunter, III and Judge Walter K. Stapleton (then Chief Judge for the District of Delaware and now a Circuit Judge of the Court of Appeals of the Third Circuit) ruled that the District Court committed legal error with respect to all three grounds on which it relied in directing a verdict against Indian Coffee.[2] The opinion of the Court of Appeals is reported at 752 F.2d 891. Folger's petition for rehearing and rehearing *in banc* was denied on February 15, 1985. Folger's jurisdictional statement is correct (Pet. 1).

---

2. The Court of Appeals affirmed the District Court's summary judgment against Penn-Western Food Corp., a wholly-owned subsidiary of Indian Coffee on the ground that it has sold its cause of action to a third party. This matter is not before this Court.

B. Statement of the Facts.

From 1966 to early April, 1974, Indian Coffee manufactured coffee in a Pittsburgh area plant. It sold coffee to the grocery trade (grocers, grocery warehouses, group buying organizations, and grocery chains) in the greater Pittsburgh area, in areas north and east of Pittsburgh, and in a limited area of eastern Ohio along the Pennsylvania border, including Youngstown, Ohio (1-100a-102a, 195a-198a). Its principal product, Breakfast Cheer Coffee, had been sold in Western Pennsylvania for over 50 years by Indian Coffee and its predecessors (1-127a, 128a, 137a-138a). It also sold private label coffee (specific grocers' brands), institutional coffee to restaurants, clubs, etc., and small amounts of tea and instant coffee (1-104a). Its operations were essentially integrated (1-156a-158a). It had two subsidiaries, Penn-Western, also a local coffee roaster, and Fried Provision Company, which sold processed meats to grocers in the Pittsburgh area (1-132a-134a, 169a, 170a, 3-1374a).

Folger, a subsidiary of The Proctor & Gamble Company, sold coffee (3-1304a, 1305a) for many years in the states west of the Mississippi River, as well as in some southern and mid-western states ("Original Folger Area") (1-101a). It also sold instant coffee in its original areas. In late 1971, Folger began selling coffee (but not instant coffee) in the Cleveland marketing area. In March, 1973, it began selling coffee in the Pittsburgh and Philadelphia marketing areas, the latter area not being involved in this case (1-102a, 103a).

Indian Coffee, Folger and their competitors sold coffee to the grocery trade. The grocery trade treated coffee

as a product separate from other coffee products. Instant coffee had no appreciable effect on the sale of coffee to the grocery trade (1-147a-149a, 374a, 396a, 2-774a).

Coffee was frequently "featured" by a grocer—i.e., advertised and sold to consumers at a low price (sometimes below the grocer's cost as a loss leader) to encourage consumers to shop at the particular grocer's store (1-173a-175a, 357a, 358a; 2-919a, 920a, 1082a). A high percentage of all coffee sold to the grocery trade was featured (1-179a-181a, 187a). The grocery trade's decision as to which coffee to purchase, and especially to feature, was influenced principally by the price (cost to the grocer) of the coffee, provided there was significant market acceptance of the coffee (1-106a, 107a, 168a, 170a, 177a, 352a, 353a; 2-762a-767a).

The grocery trade, as well as the coffee manufacturers, used and treated "dead net price" as the price at which coffee was offered and sold (1-106a, 107a, 170a, 342a, 343a, 356a, 357a; 2-765a, 766a, 920a, 921a, 1045a, 1128a, 1129a). Dead net price is a manufacturer's list price less all available trade allowances given by a manufacturer (1-104a-107a, 168a, 169a, 456a).

Each coffee manufacturer had a list price for its coffee which in Folger's case was a nationwide list price (1-104a). List prices changed from time to time in response to cost changes, principally green coffee cost (1-106a). From time to time, and for specific periods, manufacturers offered trade allowances to the grocery trade in a specific area conforming to grocery trade warehouses and distribution patterns (1-104a, 105a). Trade allowances were (1) off-invoice allowances (OI) deducted from

the invoice price (1-105a, 363a, 364a); (2) performance allowances, typically an allowance for advertising the coffee (in the grocer's usual weekly advertisement) or displaying the coffee (stacking cases in a conspicuous place in the store) (1-105a); (3) movement allowances, typically a count and recount (CRC) paid on all coffee moved either from warehouses to stores or from stores to consumers (1-597a-599a); and (4) in-ad coupons (IAC) which the coffee manufacturer authorized the grocer to place in its usual weekly advertising and which the grocer, upon redemption by consumers, delivered to the coffee manufacturer for a specific rebate (1-104a-106a).

Off-invoice allowances were deducted on the sale invoice (1-105a). Performance, movement and in-ad coupon allowances were normally paid by the manufacturer on a bill back basis, i. e., after satisfying the allowance requirement, the grocer billed the manufacturer for the allowance amount (1-107a, 388a). Off-invoice and performance allowances were paid or calculated on coffee bought during a specific time period, movement allowances on all coffee moved during a specific time period, and in-ad coupon allowances on coffee issued by the grocer and used by consumers during a specific time period. Trade allowances were frequently combined so that more than one allowance was available during a time period (3-1545a-1559a). All trade allowances were paid directly to the grocery trade. Coffee manufacturers furnished the grocery trade with promotion announcements and other written material describing the trade allowances being offered (1-388a-391a, 455a, Plaintiff's Trial Exhibits 17-22).

Coffee was sold to the grocery trade in 24# cases, containing either 24 1# cans, 12 2# cans, or 8 3# cans

(1-104a). Most trade allowances were based on cases, except in-ad coupons which were based on cans (3-1345a).

In Cleveland, 2# cans and 3# cans were about equally popular (3-1561a-1572a). In Pittsburgh, however, the 3# can was by far the most popular—representing a high percentage of features and sales (1-181a, 355a, 383a, 384a, 461a-463a, 587a; 2-765a, 920a). From May, 1973 (after the introductory promotion) through March, 1974, 3# cans were 77.9% of Folger's shipments to the Pittsburgh market (3-1477a-1490a, 1573a-1632a). Indian Coffee's sales of 3# cans were an equally high percentage of its sales (1-463a, 511a). Trade allowances were highest for the most popular size cans (1-355a-357a; 3-1545a-1559a).

Before Folger's entry, the principal competitors in Cleveland were Maxwell House (a division of General Foods and the largest selling brand), Hills Bros., Chase & Sanborn (a division of Standard Brands), grocers' private label brands, and some minor brands (1094a). Breakfast Cheer was not a large factor in the total Cleveland market because it was sold only in limited parts of that market close to the Pennsylvania border (1-101a, 102a, 195a-198a; 2-1087a, 1088a).

In Pittsburgh, prior to Folger's entry, the principal competitors were Maxwell House (again, the largest seller), Indian Coffee (whose Breakfast Cheer was the number two selling brand), Hills Bros., Chase & Sanborn, grocers' private label brands, and other minor brands (1-188a, 189a, 317a, 437a-439a, 563a, 564a, 2-762a).

Maxwell House, Folger, Hills Bros. and Chase & Sanborn all sold coffee in many areas of the United States (3-1453a-1463a). Some private label coffee, such as Kro-

ger's, was also sold in a number of market areas (2-915a, 916a, 1096a, 1097a). Indian Coffee was the only local roaster with significant sales in either Cleveland or Pittsburgh market areas (3-1463a).

For the 52 weeks ended December 22, 1972, (before the Folger Pittsburgh entry) the greater Pittsburgh market area (3-1365a) shares of coffee sales (measured by the movement of coffee from warehouses) were Maxwell House 36.9, Breakfast Cheer 13.2, Hills Bros. 8.7, Chase & Sanborn 5.8, Folger 0.5, and all private label 26.3 (3-1518a). The Indian Coffee share in its primary Pittsburgh marketing area (1-101a) was substantially higher (1-139a). Indian Coffee's Breakfast Cheer was a strong second in both sales and featuring in the Pittsburgh area (1-353a, 354a, 359a, 445a, 564a; 2-767a; 3-1518a). It was featured more than any brand by many grocers (1-139a, 359a, 383a, 440a, 565a; 2-766a, 921a, 1094a).

Before Folger entered Cleveland and Pittsburgh, Indian Coffee had been the most aggressive competitor in offering trade allowances in its continuing attempt to build market share (1-482a; 2-766a, 921a, 1094a). Nevertheless, Indian Coffee was profitable and during that period acquired Penn-Western in 1970 and Fried Provision Company in 1969 (3-1367a-1391a). By the end of 1971, it had acquired a significant market share (about 18%) in its primary marketing area and was ready to shift emphasis from market share expansion to profitability (752 F.2d at p. 897; 1-132a, 139a, 479a, 534a, 556a).

Folger entered the Cleveland market in late 1971 with consumer promotions, heavy advertising and high, escalating trade allowances (1-199a, 203a-213a). Maxwell

House did not initially respond to Folger's Cleveland trade allowances, but after several months began to *meet* the Folger trade promotions (1-211a; 2-1070a, 1073a). Folger's Cleveland trade allowances affected Indian Coffee in those parts of the Cleveland area in which Indian Coffee sold coffee and, as a result of spillover, in the northern part of the Pittsburgh area (1-203a-213a; 2-1049a, 1050a). At least two early Folger promotions (in 1971 and early 1972) were available in Pittsburgh (1-200a-202a). In 1972, Indian Coffee at first attempted to match the Folger Cleveland trade allowances (1-213a). However, the level of Folger's trade allowances soon forced Indian Coffee to sell coffee at a loss to compete or forego competitive prices with resulting loss of business. To preserve Indian Coffee's assets, as 1972 passed, it reduced competitive pricing in the areas affected by the Folger Cleveland promotions (1-287a-289a).

In early 1973, Folger established a Pittsburgh district sales office (2-1049a) and, in March, 1973, began offering trade promotions directed to the Pittsburgh market (1-103a; 3-1545a-1559a). It engaged in extensive advertising and consumer directed promotions as well (1-366a, 386a). Its trade allowances, which began at a high level, *continued to increase* and became concentrated in the dominant 3# can size (1-263a, 264a; 3-1554a-1559a); (See also *Indian Coffee Corp. v. Folger Coffee Co.*, CCH 1982-83 Trade Cases ¶ 65, 186.) Maxwell House immediately responded by meeting the Folger trade allowances and dead net prices (1-391a, 392a; 2-771a, 772a, 1070a-1076a). Hills Bros. and Chase & Sanborn also offered increased trade allowances, but were not then a significant market factor (1-317a, 318a, 392a; 2-773a). Indian Cof-

fee, which was a very significant market factor, at first attempted to compete with equivalent trade allowances, but could not continue to do so because of all the losses sustained (1-295a, 370a, 392a, 449a, 450a; 2-772a). The Folger trade allowances required Indian Coffee to sell coffee substantially below cost to be competitive (1-291a-295a).

Folger's trade allowances on 3# cans in the Cleveland market area went from about 21% of list price in late 1971 and early 1972 to as high as 35% of list price in late 1973 and early 1974 (3-1346a, 1551a-1554a). In Pittsburgh, Folger's trade allowances on the 3# can began at 31% of list price in March, 1973, and were as high as 37.7% in November/December, 1973 (3-1349a, 1558a, 1559a). During the period from late 1971 to early 1974, trade allowances paid in the non-expansion Folger area averaged about 14% of its list price, which was a normal trade allowance level (3-1340a, 1341a).

By late 1973, Indian Coffee was financially unable to sustain the losses dictated by trade allowance levels and began seeking a buyer for its coffee business (1-297a, 298a). Its coffee sales and market share dwindled in early 1974 to virtually nothing (1-300a, 313a, 314a, 444a, 572a).

Indian Coffee went from an operating profit (before interest, taxes and life insurance) of $86,871 in 1970 to $79,464 in 1971 (3-1379a), before Folger's entry, to an operating profit of $2,200 in 1972 (3-1387a), and losses of $170,876 in 1973 (3-1395a), and $88,852 in the first three months of 1974 (3-1399a). In early April, 1974, Indian Coffee, under severe financial distress, sold the assets of its entire integrated coffee business (including Penn-Western, its private label and institutional business and

its tea business) for approximately $272,000 (1-302a-312a). It retained all of its liabilities and a significant contingent liability under a lease (1-307a, 308a). Expert witnesses (whose testimony was subsequently stricken by the District Court) valued Indian Coffee's coffee business as high as $3,200,000 at the end of 1971 and $3,500,000 at the end of 1972 (2-832a; 3-1440a, 1441a, 1444a). Mr. Deily testified that in his opinion Indian Coffee was worth $4.5 million as of the end of 1971 (34A). The purchaser of the coffee business was never, thereafter, a factor in the sale of coffee to the grocery trade (1-315a-317a; 2-733a, 925a).

In Pittsburgh, by early 1974, coffee sales and featuring had become largely concentrated in the two largest national brands—Maxwell House and Folger (1-392a; 3-1518a); convenience stores went from carrying two brands, Maxwell House and Breakfast Cheer, to one brand, Maxwell House (1-445a); similar decreases in choice affected small groceries (1-373a); there were signficant reductions in the market shares and vigor of competition of Hills, Chase & Sanborn (which eventually virtually disappeared from the market), and private label, as well as Indian Coffee's Breakfast Cheer (1-300a, 313a, 314a, 318a, 319a-323a, 394a-396a, 404a, 572a, 573a; 2-773a; 3-1518a). Kroger, a large grocery chain with its own coffee roasting facility, actually considered pulling its private label from both the Cleveland and Pittsburgh markets because of the losses it was suffering but refrained from doing so because of the expected high cost of regaining market share (2-1110a, 1111a).

From the 52 week period ending December 22, 1972, to the 52 week period ending March 15, 1974, the Pittsburgh market share of Breakfast Cheer dropped from

13.2 to 5.8, Hills Bros. dropped from 8.7 to 6.5, Chase & Sanborn dropped from 5.8 to 2.9, and Private Labels dropped from 26.3 to 15.3. On the other hand, Folger's increased from 0.5 to 12.3 and Maxwell House from 36.9 to 48.7 (3-1518a). In early 1974, Indian Coffee's shares for successive four week periods averaged about 1 (3-1364a).

The precipitous decline in sales by Pittsburgh competitors, other than Maxwell House and Folger, occurred because the level of trade allowances required selling coffee at a heavy loss. Folger's Pittsburgh 3# dead net prices were below the materials cost (green coffee and packing) for 1973 and early 1974 as was sales realization for the last three quarters of 1973 (3-1401a, 1410a). Folger's dead net prices were below the cost of manufacturing, selling and distributing coffee in Cleveland and Pittsburgh for virtually the entire relevant period (752 F.2d at p. 902; 3-1409a-1426a). Folger suffered a loss of approximately $2,388,000 from the sale of its coffee in the Pittsburgh area alone from March, 1973 through March, 1974 (3-1336a).

Under the District Court's definition of price, Indian Coffee did show substantially lower Folger prices in Cleveland from September, 1972 through March, 1974, and in Pittsburgh from March, 1973 through March, 1974, than in its other market areas (3-1561a-1634a). However, the District Court's definition of price created a much higher Folger price level (Trial Exhibit 389B, 3-1471a) than if price reflected all trade allowances (Trial Exhibit 389 Rev., 3-1465a). It drastically reduced the geographical price discrimination from the levels reflecting all allowances in price (752 F.2d at p. 902; Trial Exhibit 273, 3-1363a; Trial Exhibit 533 Rev., 3-1477a-1517a). The def-

inition also prevented Indian Coffee's establishing the large geographical price discriminations (e.g., $7.45 per case in the last quarter of 1973, in Pittsburgh) as recorded in Folger's accounting records (Trial Exhibit 13 3-1306a-1329a, 1363a).[3] The District Court's price definition eliminated any geographical price discrimination in Cleveland until September, 1972.

REASONS FOR DENYING THE PETITION

INTRODUCTION

The implicit basis of the Folger argument, to which the trial court succumbed, is that any and all price competition—no matter how it is conducted—increases competition and benefits the consumer. Hence Folger argues price competition cannot be actionable, even though it destroys a large competitor (Indian Coffee), weakens all competitors, other than Maxwell House, and creates an oligopolistic market dominated by two national companies.

Congress in enacting the Robinson-Patman Act recognized that while temporary lower prices may at first blush appear to increase competition, the *long term effect*, as here, may be to destroy local business and weaken competitive abilities and zeal and, therefore, harm the entire competitive process and competition. See *Moore v. Meade's Fine Bread Co.*, 348 U.S. 115, 117-19 (1954); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543 (1960); A.B.A.

3. Trial Exhibit 13 (3-1306a-1329a) summarized trade allowances based on Folger's accounting records (1-376a-378a, 397a-417a).

Antitrust Section, Monograph No. 4, The Robinson-Patman Act: Policy and Law, Vol. I 74-78.

There are no novel principles to be considered by this Court to dispose of Folger's contentions. The determination of this case depends upon its facts and not upon the well settled legal principles which clearly apply. Folger's Petition is merely a furtive attempt to circumvent established principles by raising the factual questions which are properly the province of the jury.

Indian Coffee offered evidence from which a jury could find that Folger violated Section 2(a) of the Robinson-Patman Act in the sale of coffee in the Cleveland and Pittsburgh market areas and award Indian Coffee damages under Section 4 of the Clayton Act, 15 U.S.C. Section 15. Its evidence established Folger's geographical price difference between prices in Cleveland and Pittsburgh and prices in other areas of the United States; harm to competition through the destruction of Indian Coffee as a competitor, the weakening of other competitiors, a declining price structure, and predatory below cost selling; harm to Indian Coffee from its inability to meet Folger's low and predatory below cost price levels over a long period of time; and damages by documented operating losses sustained after the Folger entry and the sale of its coffee business for a value substantially less than its value before Folger's geographical price discrimination.

I. INDIAN COFFEE PROVED DAMAGES.

Indian Coffee chose a damage theory supported by a reasonable foundation—the value of its coffee business as measured by what a buyer might reasonably be expected to pay for it, absent the effect of Folger's unlawful conduct. Each of Indian Coffee's expert witnesses used that

theory. Based on their extensive experience, each reviewed the factors affecting or determining the value of a business. Each applied the reasonable probability or inference that businesses, over the long run, operate to maximize profits and in a normal market do make a fair profit. Each considered that Indian Coffee, like most small companies, had for years concentrated on increasing business value by building market share and customer acceptance, rather than increasing currently taxable profits. Indian Coffee followed the same philosophy as Folger (and Proctor & Gamble)—profits would follow acquisition of market share (752 F.2d at pp. 897-898; 2-1042a, 1043a). Indian Coffee operated, however, without subsidization from profits elsewhere and without selling at unremunerative prices.

Dr. Kaplan and Mr. Bissell evaluated Indian Coffee in the normal business environment by assuming that it could operate with trade promotion allowances comparable to the normal levels of about 14%, as Folger did in its Original Area; as Maxwell House had done in Cleveland before the Folger entry; and as Mr. Deily testified was the level in a normal market. Mr. Darby evaluated Indian Coffee in the normal business environment by using multiples and valuation of other companies in the same or related businesses, because in his experience that was a manner in which businesses were frequently valued. Indian Coffee's strong market acceptance in its local area (which all trade witnesses recognized) was an underlying basis for the opinion that it could achieve normal profits in a normal market if it so elected. Nevertheless, each expert discounted the calculated values to reflect Indian Coffee's small size, limited market, and other uncertainties. (See pp. 23-28 for a further discussion of Indian Coffee's expert opinion evidence.)

Folger's reliance on *Brunswick* is misplaced. (Pet. 9). *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). In *Brunswick,* plaintiffs sought to prove the profits that they would have realized assuming that the bowling centers Brunswick acquired and continued to operate had instead been closed. The court's holding provided that the theory was defective because plaintiffs would have sustained a loss despite Brunswick's acquisition of the centers, had the centers remained opened as a result of obtaining refinancing or being purchased by another firm. In other words, an injury resulting from normal price competition would not be actionable. But here, the injury suffered by Indian Coffee resulted from Folger's *predatory pricing* which was an anticompetitive injury because the substantive violation is anticompetitive by its nature. See *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 856, n. 16 (5th Cir. 1981); (752 F.2d at p. 903).

In addition to the expert opinions, there was in evidence Indian Coffee's financial statements showing an operating profit from 1969 to 1971. (3-1379a) Indian Coffee also offered into evidence information regarding future lost profits. (752 F.2d at p. 900, n. 4)

In summary, Indian Coffee proved some amount of damages.

II. THE FACTUAL RECORD CONTAINS EVIDENCE FROM WHICH A JURY COULD FIND HARM TO COMPETITION WHERE INDIAN COFFEE HAD SHOWN BOTH ACTUAL COMPETITIVE INJURY AND EVIDENCE OF SALES BELOW COST FROM WHICH PREDATORY INTENT COULD BE INFERRED.

The two separate bases for finding harm to competition recognized by the Supreme Court's decision in *Utah*

Pie are present here. (752 F.2d at pp. 901-903). *Utah Pie v. Continental Baking Co.*, 386 U.S. 685 (1967). First is the broad range of factors including a local competitor which is harmed, injury to competitors other than the plaintiff, a long period of price cutting, a declining price structure, and below cost selling. 386 U.S. at 697-702. Second is below cost selling from which competitive harm may be inferred. *Accord* 386 U.S. at 696 n. 12; *Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97, 104 (10th Cir.), *cert. denied*, 414 U.S. 975 (1973); *National Dairy Products v. FTC*, 412 F.2d 605, 610 (7th Cir. 1969); *Lloyd A. Fry Roofing Co. v. FTC*, 68 F.T.C. 217 (1965), 371 F.2d 277, 284-85 (7th Cir. 1967); *Ben Hur Coal Co. v. Wells*, 242 F.2d 481, 486 (10th Cir.), *cert. denied*, 354 U.S. 910 (1957).

While there is certainly other evidence of competitive harm, "below cost" selling is "[p]erhaps the single most important indicia of predatory intent." 4 VAN KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION Section 29.02[2] [a] (1983). The Supreme Court's directive in *Utah Pie* "to ascertain a seller's intent from surrounding economic circumstances, which would include persistent unprofitable sales below cost and drastic price cuts themselves discriminatory" is controlling and permits the inference of harm to competition. 386 U.S. at 696 n. 12.

Folger's prices were below its raw material, manufacturing and delivery cost and below virtually any other cost measure. Competitors were required to sell below such cost to all customers in the relevant market to compete. Indian Coffee ceased to be a competitor. The market share of every competitor except Maxwell House and Folger, the two largest coffee companies nationwide, de-

clined substantially. There was a trend toward oligopoly because the two dominant coffee manufacturers nationwide also became the two dominant firms in the Pittsburgh market.

The evidence here would permit the jury to find an actual predatory intent—i.e., the intent to destroy a competitior by below cost selling. While there might not be a "smoking gun", Folger certainly knew that Indian Coffee was a purely local competitor with a large market share, wholly dependent on local sales, and susceptible to grievous harm from protracted below cost selling. Unless Folger must be exonerated from the inevitable consequences of its actions, absent a "smoking gun", the jury should have been permitted to reach the logical conclusion that Folger *actualiy intended the destruction of Indian Coffee as a competitor*—thus establishing both harm to competition and harm to Indian Coffee.

A. Potential Monopoly Power Is Not Essential To Establishing Predatory Pricing In A Robinson-Patman Case.

No geographical price discrimination case requires showing potential monopoly power to permit a finding of predation and harm to competition from below cost selling.

As the Supreme Court in *Utah Pie* implicitly recognized, while proof of ability to monopolize may be necessary in Section 2 Sherman Act, 15 U.S.C. Section 2, cases —because otherwise there is no illegal act—it is entirely unnecessary in a Robinson-Patman Section Act Section 2(a) case because geographical price discrimination supplies the illegal act. In *Utah Pie* the plaintiff, not the defendants, was virtually a monopolist. 386 U.S. at 705.

See also *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 853, n. 16 (5th Cir. 1981).

The argument that a Section 2(a) geographical price discrimination case requires a plaintiff to first prove monopoly, or ability to monopolize, before using predatory pricing as evidence of harm to competition is, to say the least, curious. It permits the proof only when unnecessary or cumulative because monopoly is already established. It prevents the proof when it is necessary to establish the harm. A rather unusual approach, to say the least, where as here the below cost selling injured Indian Coffee fatally, and all other competitors markedly, despite the absence of any monopoly power.

While the ability to monopolize and thereby make unusual profits is a necessary showing in a Sherman Act case, the profit opportunity from geographical price discrimination at below cost levels is present without monopoly power. The penalty of below cost selling to a multi-market Folger is relatively small because the below cost sales are limited to a small portion of the area in which it sells. Prices and profits can be maintained elsewhere. For the local competitor, however, it is unmitigated disaster because there is no place to make up the losses. The multi-market competitor benefits greatly.

The Folger philosophy that *profits will follow market share* (2-1042a, 1043a) demonstrates the tremendous advantage of selling below cost to take business from Indian Coffee and others in the local area.

B. New Entrants Are Not Immune From Robinson-Patman Act Liability.

Folger's new entrant argument attempts to have this Court add, by judicial accretion, to the statutory defenses

in a geographical price discrimination suit. No provision of the Robinson-Patman Act specifically exempts new entrants from its application. Both conceptually, and from a reading of the cases cited in the Petition, a new entrant is free from Robinson-Patman liability, not because exempted, but because factually no harm to competition has been shown. Therefore, even if Folger was a new entrant, it should not prevent Indian Coffee's making out a case under Section 2(a).

While theoretically, the appearance of a new entrant increases competition, rather than harming it, its method of entry might, as here, harm competition. Under the Folger theory, large, wealthy corporations, thriving on extensive profitable operations in other areas, could enter new local markets with geographically lower prices at a fraction of the cost of producing the product. Folger could continue such below cost sales until all local competitors were forced out of business, because local competitors would be unable to finance sales at a loss to maintain market position. The local competitors are equally dead, whether killed by a new entrant or an old competitor.

Folger relies most heavily on two cases in support of its new entrant argument: *Dean Milk Co. v. FTC,* 395 F.2d 696 (7th Cir. 1968) and *National Dairy Products v. FTC,* 412 F.2d 605 (7th Cir. 1969). Neither establishes a new entrant exception or holds that evidence of long continued sales below cost cannot permit an inference of harm to competition by new entrants.

In *Dean,* the court particularly noted that persistent sales below cost and radical and discriminatory price cuts are significant factors in proving harm to competition. "[P]roof of their existence . . . could give rise to an in-

ference of predatory intent and apparently would preclude characterizing a company's activities as motivated by only fierce competitive instincts." 395 F.2d 707-08 (footnote omitted). Below cost sales were sporadic and negligible. *Id.* at 708. Contrary to Folger's assertion, *Dean* does not create a new entrant exception to liability under Section 2(a).

Folger clearly misconstrues the Seventh Circuit's reference to new entrants in *National Dairy Products*. The court said: "[i]n arriving at the finding of predatory intent, *the sum total of all the evidence must be considered.*" 412 F.2d at 618 (emphasis supplied). The court did not condone persistent sales below cost by new entrants, but only geographically lower prices used to combat an entrenched monopolist. The trier of fact has to evaluate the evidence, in any event, to determine which objectives are present.

C. Indian Coffee Offered Evidence From Which A Jury Could Find Harm To Competition From Folger's Geographical Price Discrimination.

Section 2(a) does not even require showing actual harm to competition—by its very language it requires only showing that the effect of geographical price discrimination "may be substantially to lessen competition." The "Act reaches price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact." *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 703 (1967). A Section 2(a) geographical price discrimination case, it held that legally required harm to competition may be

found, *inter alia,* from all attendant circumstances, including a local competitor competing against multi-market competitors, injury to competitors other than the plaintiff, a long period of price cutting, a declining price structure, and below cost selling. *Id.* at 697-702. Accord *Continental Baking Co. v. Old Homestead Bread Co.,* 476 F.2d 97, 105 (10th Cir. 1973); *Atlas Building Products Co. v. Diamond Block & Gravel Co.,* 269 F.2d 950 (10th Cir. 1959), *cert. denied,* 363 U.S. 843 (1960). Here, there was harm and destructive impact, as well as erosion of competition (752 F.2d at pp. 902-903).

Curiously, the evidence from which the District Court concluded that competition was increased not harmed included the factors appearing in *Utah Pie* plus more: (1) a local company competing with a number of multi-market companies (2-1135a; 3-1463a, 1518a); (2) the actual destruction of the local competitor (1-288a-316a; 3-1367a-1399a, 1400a); (3) marked reduction of the Pittsburgh market shares of every competitor except Maxwell House and Folger, the two largest coffee companies nationwide (3-1518a); (4) reduction in consumer choice in convenience stores from two brands of coffee (Maxwell House and Breakfast Cheer) to one brand (Maxwell House) (1-445a); (5) consideration by Kroger, a large grocer, of withdrawing its private label brand from the markets because of continuing losses, but electing not to do so because of the anticipated heavy expense of any attempt to reacquire lost market position (2-1110a-1111a); (6) virtual elimination of Chase & Sanborn from the Pittsburgh market (1-318a-319a, 394a-395a; 2-773a, 925a); (7) concentration of coffee featuring Maxwell House and Folger (1-318a-320a, 396a; 2-926a); (8) long continued price cutting (3-1545a-1559a); (9) long continued below

cost selling (3-1401a-1426a); (10) a declining price structure in the eye of the coffee trade (3-1465a-1476a); and, (11) ultimate domination of the market by the two largest multi-market companies, Folger and Maxwell House, which had displayed a willingness to sell their coffee at tremendous losses to hold or increase market share (1-368a, 370a, 391a-392a; 2-922a-924a; 3-1518a). If that is increased competition, then God help all competitors unable or unwilling to absorb large losses for a long time period and the consumers who will ultimately be the victim of Folger's philosophy that when market share is acquired, profits will follow (2-1043a).

Utah Pie had one significant difference. *Utah Pie,* which had a 66.5% market share before and a 45.3% market share afterward, survived and prospered. 386 U.S. at 705.

The District Court succumbed to the superficial argument that Folger's actions in the Cleveland and Pittsburgh areas were a boon to competition and consumers because it added a new vigorous competitor and lowered prices to consumers. With that short-sighted a vision, it would be virtually impossible to postulate a geographical price discrimination which harmed competition. Aggressive competition at a low price is essential to a Section 2(a) case. While lower prices and a new entrant are appealing at first blush, all that glitters is not gold. Heavy price promotion may, in the short term, appear pro-competitive, but in the *long term,* as here, it will weaken and harm competition. Competitors were weakened, discouraged, or destroyed (3-1518a); a strong local competitor was eliminated to be replaced by a multi-

market giant (1-288a-316a; 3-1367a-1399a, 1400a); and two multi-market companies then dominated the market (1-319a-320a; 2-926a; 3-1518a). Such market domination, with the demonstrated willingness to suffer large losses to get and maintain market share, hardly encourages a truly competitive market in which all manufacturers have a real chance of competing.

This case represents the classic erosion of competition condemned by *Utah Pie,* 386 U.S. at 703, as well as direct immediate harm to competitors and competition. Thus, a jury could have reasonably concluded, from all the evidence, that there was harm to competition from Folger's geographical price discrimination.

III. THE COURT OF APPEALS' RULING ON THE ADMISSIBILITY OF EXPERT OPINION EVIDENCE UNDER RULE 703 OF THE FEDERAL RULES OF EVIDENCE WAS CORRECT AND DOES NOT WARRANT REVIEW BY THIS COURT.

The Court of Appeals unanimously ruled that the trial court committed legal error in striking Indian Coffee's expert evidence on valuation (752 F.2d at p. 894). Each of the acknowledged expert witnesses described the information relied upon, the source of such information and, additionally, testified that it was the type of information relied upon by experts in the field of valuing a business (1-620a-649a; 2-650a-655a, 818a-820a, 928a-941a). Nevertheless, the trial court excluded Dean Kaplan's and Mr. Bissell's testimony on the ground that neither could rely on Mr. Deily's testimony concerning a normalized market trade allowance level of 14% because it was unreliable (1-94a; 33A-34A).

There was other compelling evidence indicating that 14% was in fact a normal level for trade allowances—principally Folger's own records showed that trade allowances in its entire Original Folger Area averaged about 14%.[4] In addition, cost information of Maxwell House in Cleveland from April to December, 1971, prepared by an FTC staff accountant, showed a 14% advertising and trade promotion cost (2-673a; 3-1428a). Therefore, not only was Mr. Deily's testimony corroborated in fact as reliable, based on his extensive knowledge of the coffee business and the facts from Folger records and the Maxwell House information, the corroborative evidence itself was ignored as proof of the 14% level.

Mr. Darby did not rely on the 14% trade allowance level, but rather looked at profit levels of comparable companies, the value of a coffee business sold in 1971, and the Folger cost of acquiring a 12% market share in Pittsburgh in valuing the business (2-938a-941a). His opinion was also stricken because of a reliance on Mr. Deily's opinion that Breakfast Cheer could reduce trade allowances and still maintain its market position (2-1293a). Again, the decision focused on Mr. Deily's statement and ignored other relevant evidence.

Mr. Darby expressly relied on a number of interrelated factors: that Indian Coffee had a material market share (which could vary somewhat without affecting his opinion); that its previous corporate goal had been to

---

4. Reduced Revenue plus In-Ad Coupons divided by Sales Realization from Trial Exhibit 14 (3-1340a, 1341a, 1405a, 1407a). Dean Kaplan's 15.8% included advertising as well (2-673a, 3-1428a).

minimize profits and maximize growth; that its Breakfast Cheer Coffee was a widely accepted brand; and that a company could make a fair profit in a normalized market (2-987a-989a, 1005a-1006a). He also took potential new entrants into consideration (2-1005a-1007a). Each of these factors directly relate to how the market would look to a potentially interested buyer. Mr. Deily's statement about maintaining market share was but another factor on that point.

Mr. Deily testified that Indian Coffee's attempt to raise its market share by trade promotional activity was responsible for the higher than normal trade allowances in Pittsburgh (1-329a, 330a, 556a). Mr. Deily acknowledged that reduction in trade allowances would have to be done in stages, but certainly did not prove that the normalized level (or a level approaching the normalized level) could not be reached without loss of market share (1-534a-537a, 556a, 558a, 559a). The large Original Folger Area reflected a normal trade allowance level; the Maxwell House figures for Cleveland, the market next door, reflected a normal trade allowance level; and normal businessmen act to maximize profits. There was no basic reason whatsoever to infer that Indian Coffee, with its wide acceptance by both grocers and consumers in the Pittsburgh area, would fare worse than others in a market dedicated to maximizing profit.

The issue is thus analogous to that in *Malcolm v. Marathon Oil Co.*, 642 F.2d 845 (5th Cir. 1981), where the plaintiff sought damages based upon a "normal price", proved by evidence supplied by a principal of the plaintiff and information taken from records of the defendants. The court there determined that it was for the jury to

decide the true level of normal prices as an issue of credibility or reliability. *Id.* at 858, 859, n. 24. The court also pointed out, *Id.* at 857, n. 22, that absent evidence to the contrary, it will be assumed that businessmen are profit maximizers and so act (quoting from *Knutsen v. Daily Review, Inc.*, 548 F.2d 795, 812 (9th Cir. 1976). In short, that case confirmed just what Indian Coffee's expert witnesses assumed for the purpose of their valuation —that businessmen would act in a reasonable and sensible manner to maximize profits and would not long engage in profit-limiting actions. While the holdings in *Malcolm* were on a motion for directed verdict, we submit it was manifestly erroneous for the District Court, not the jury, to decide an issue of fact, and inferences from facts, merely because they relate to expert testimony.

A reading of the entire testimony of Kaplan (1-610a, 2-757a), Bissell (2-781a-786a), and Darby (2-928a-1032a) demonstrates that as experts were testifying essentially about the future—what would happen but for Folger's intrusion in the market with *sales below cost*—and there must be some uncertainties. Undoubtedly, one uncertainty was what would have actually happened in the market. Current market acceptance and the predisposition of businessmen to maximize profits are the prime factors in predicting what will happen. The experts factored them into the valuations, with substantial discounts applied against Indian Coffee's value to allow for any perceived uncertainty.

As in most things, absolute certainty is not available and, when claimed, is suspect. But such intrinsic difficulty cannot be an excuse to immunize otherwise illegal conduct. It is beyond cavil that the antitrust plaintiff's

burden of proving the amount of damages is lighter than its burden of proving cognizable injury attributable to the violation. As the Supreme Court stated in *Story Parchment Co.*, 282 U.S. at 562-63:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief in the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result may be only approximate."

When proof of the fact of damage is established, proof of the amount may actually border on the speculative to facilitate the policy of the antitrust laws. *Malcolm,* 642 F.2d at 858; *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894, 903 (5th Cir. 1973); *Ford Motor Co. v. Webster's Auto Sales, Inc.,* 361 F.2d 874, 887 (1st Cir. 1966). Indeed, estimates as to the amount of damages may rest on assumptions so long as these assumptions rest on an adequate base. *Malcolm,* 642 F.2d at 858; *Terrell v. Household Goods Carriers' Bureau,* 494 F.2d 16, 24 (5th Cir. 1974); *Hobart Brothers Co.,* 471 F.2d at 902. Here the adequate bases included the statistical information supporting the 14% trade promotion level, as well as Mr. Deily's testimony; the profit maximizing assumption; and the strong Breakfast Cheer franchise recognized by all the trade witnesses (1-353a, 445a, 564a, 766a, 921a).

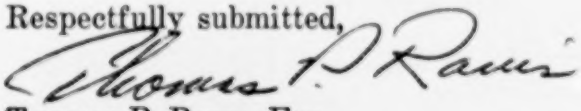
In view of the foregoing, it was a manifest abuse of discretion for the trial court to strike the expert testimony and the ruling of the Court of Appeals should be affirmed.

CONCLUSION

Respondent Indian Coffee respectfully submits that no question is presented by the decision of the United States Court of Appeals for the Third Circuit which is worthy of review by this Court. Therefore, the Petition for Writ of Certiorari should be denied.

Dated: June 12, 1985.

Respectfully submitted,



THOMAS P. RAVIS, ESQ.
Counsel of Record
992 Perry Highway
Pittsburgh, Pennsylvania 15237
(412) 367-7271
Attorney for Respondent
INDIAN COFFEE CORP.

Of Counsel:
FRANK R. FLEMING, III, ESQ.
HOUSTON HARBAUGH
Two Chatham Center
Twelfth Floor
Pittsburgh, Pennsylvania 15219
(412) 281-5060

(3)

No. 84-1796

Supreme Court, U.S.
FILED
AUG 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THE FOLGER COFFEE COMPANY,
Petitioner,

v.

INDIAN COFFEE CORPORATION,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

John W. Beatty, Esq.
DINSMORE & SHOHL
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8200
ATTORNEY FOR PETITIONER
THE FOLGER COFFEE
COMPANY

OF COUNSEL:
Mark Silbersack, Esq.
Patrick D. Lane, Esq.
John D. Luken, Esq.
DINSMORE & SHOHL
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8200

Cloyd R. Mellott, Esq.
John W. Ubinger, Jr., Esq.
ECKERT, SEAMANS,
CHERIN & MELLOTT
42nd Floor
600 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 566-6000

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE THIRD CIRCUIT'S DECISION WOULD IMPROPERLY ALLOW AN AWARD OF ANTITRUST DAMAGES PREMISED ON PLAINTIFF'S CLAIM THAT IT WOULD HAVE ACTED AS A "PRICE LEADER" TO RAISE PRICES IN A COMPETITIVELY DORMANT AREA.	2
II. THE THIRD CIRCUIT HAS ADOPTED NOVEL, ILLOGICAL, AND ANTICOMPETITIVE STANDARDS FOR PROVING "HARM TO COMPETITION" IN ROBINSON-PATMAN SECTION 2(a) CASES.	3
A. "Predatory Pricing" Requires That A Defendant Possess Or Be Capable Of Achieving Monopoly Power.	5
B. "Predatory Intent" Should Not Be Inferred From A New Entrant's Unprofitability.	5
C. Loss of Sales By An Established Seller Following New Entry Does Not Constitute Actual Harm to Competition.	6
III. THE THIRD CIRCUIT'S DECISION WOULD DESTROY THE AUTHORITY OF TRIAL JUDGES TO ASSESS THE REASONABLENESS OF THE SOURCES UPON WHICH AN EXPERT RELIES IN PRESENTING DAMAGES OPINIONS IN ANTITRUST CASES.	7
CONCLUSION	8

TABLE OF AUTHORITIES

Page

Cases:

Automatic Canteen Co. v. *FTC*, 346 U.S. 61 (1953) 5

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 2, 3

Great Atlantic & Pacific Tea Co. v. *FTC*, 440 U.S. 69 (1979) 5

In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983), *cert. granted*, 53 U.S.L.W. 3702 (U.S. April 1, 1985) (No. 83-2004) 7

Malcolm v. *Marathon Oil Co.*, 642 F.2d 845 (5th Cir. 1981) 3

United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 5

Utah Pie Co. v. *Continental Baking Co.*, 386 U.S. 685 (1967) 5

Statutes:

15 U.S.C. § 13(a) 3, 5, 8

15 U.S.C. § 15(a) 2, 3, 8

Rules:

Rule 703 of the Federal Rules of Evidence 1, 7, 8

No. 84-1796

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THE FOLGER COFFEE COMPANY,
Petitioner,

v.

INDIAN COFFEE CORPORATION,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Indian Coffee's brief in opposition to Folger's petition offers dramatic and eloquent proof of why this case merits review by the Court. First, Indian Coffee openly embraces the inherently anticompetitive antitrust theories described in Folger's petition. Thus, the important issues raised by Folger are presented here in a vivid clash both as to fundamental antitrust policy and as to substantive Robinson-Patman and remedial Clayton Act law.

Second, while the Third Circuit's opinion dealt with the antitrust issues in a cryptic and superficial manner (in contrast to its lengthy discussion of the Rule 703 evidentiary issue) nevertheless, Indian Coffee's brief confirms that the antitrust issues presented for review by Folger are indeed the crux of this case.

Third, Folger's petition identifies the serious conflict between the Third Circuit's decision and decisions of this Court, other Courts of Appeals, and the Federal Trade Commission.

Surprisingly, Indian Coffee's brief relies on cases that, if anything, deepen the conflict on the dispositive antitrust issues.

I. THE THIRD CIRCUIT'S DECISION WOULD IMPROPERLY ALLOW AN AWARD OF ANTITRUST DAMAGES PREMISED ON PLAINTIFF'S CLAIM THAT IT WOULD HAVE ACTED AS A "PRICE LEADER" TO RAISE PRICES IN A COMPETITIVELY DORMANT AREA. (QUESTION PRESENTED NO. 1)

Indian Coffee's damages were all calculated on the basis that it could have instantaneously realized dramatically enlarged profits by raising its prices without any loss of sales volume. This was in turn premised on Indian Coffee's claim that it had a legally protected right as an entrenched seller in Pittsburgh to act as a "price leader" in raising prices to non-competitive levels in cooperation with other sellers. This Court should review the decision below because the Third Circuit has approved this unacceptable theory of Clayton Act § 4 antitrust damages. As explained in the Petition (at 9-12), it is necessary and appropriate to grant certiorari, not just because such a damages theory is inherently speculative, but also because it perverts the antitrust treble damage remedy. The Third Circuit's decision on this question is clearly at odds with *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and numerous cases from other circuit courts.

It is significant to note that Indian Coffee apparently now concedes the key points on which Folger's petition relies with respect to Question 1 — to wit,

(1) that the "price leadership" damages theory described by Folger is indeed the theory relied on by Indian Coffee and approved by the Third Circuit; and

(2) that there is a clear conflict between the Third Circuit and other appellate courts as to the propriety of such a theory.

Despite these troublesome propositions, Indian Coffee argues that certiorari should be denied because *Brunswick* is inapposite (Brief at 15), and in any event such a "price leadership" damages theory is legally permissible (Brief at 15, 25-26) under a Fifth Circuit decision, *Malcolm* v. *Marathon Oil Co.*, 642 F.2d 845 (5th Cir. 1981). Indian Coffee's efforts to distinguish *Brunswick* are unpersuasive. As numerous Courts of Appeals have held, *Brunswick's* requirement that Clayton Act § 4 damages be awarded only for injury of the sort that the antitrust laws are intended to prevent would obviously preclude a recovery of damages based on a claim that the defendant's conduct prevented the plaintiff from raising prices and thereby obtaining increased oligopoly profits. The *Malcolm* case simply does not address this point, much less support Indian Coffee's position. But in any event, even if *Malcolm* were on point, this would only increase conflict among the circuits.

In short, the Third Circuit has endorsed Indian Coffee's anticompetitive damages theory, and Indian Coffee has now unabashedly asserted once again, that it is entitled to three times the amount of the increased oligopoly profits it allegedly could have obtained by leading prices upward in Pittsburgh, but which it was prevented from obtaining because of the increase in competition following Folger's new entry. Folger respectfully submits that its first question for certiorari could hardly be more sharply presented than in this case — nor more deserving of this Court's review and reversal.

II. THE THIRD CIRCUIT HAS ADOPTED NOVEL, ILLOGICAL, AND ANTICOMPETITIVE STANDARDS FOR PROVING "HARM TO COMPETITION" IN ROBINSON-PATMAN SECTION 2(a) CASES.

As explained in the Petition (at 9-20), the decision below is anticompetitive because it endorses Indian Coffee's contention that "harm to competition" may be shown by evidence of

nothing more than (a) sales below cost by a new entrant with a 12% share and no reasonable expectation of ever achieving monopoly power, or (b) loss of market share by existing sellers following a new competitor's entry. Not only are these propositions illogical, but in effect they establish virtual "automatic liability" under the Robinson-Patman Act for all entrants and, thus, would discourage pro-competitive new entry. Moreover, each such proposition conflicts with decisions of this Court, other circuit courts, and the FTC.

Again, with respect to Questions 2, 3 and 4 in the Petition, it is important to note what Indian Coffee's Brief does not contest — to wit,

(1) that each of the propositions described in the petition was indeed approved by the Third Circuit;

(2) that the evidence at trial was as described in the Petition, in that Folger did not have and could not anticipate acquiring monopoly power;

(3) that the Third Circuit accepted the inference of "harm to competition" from a new entrant's almost inevitable unprofitability;

(4) that the Third Circuit illogically relied on Indian Coffee's loss of market share as proof of "actual harm to competition";

(5) that the decision below creates a grave threat of "automatic liability" for new entrants, which will have a serious "chilling effect" on pro-competitive entry; and

(6) that on all of these points there is a clear conflict between the decision below and other circuit court decisions.

A. "Predatory Pricing" Requires That A Defendant Possess Or Be Capable Of Achieving Monopoly Power (Question Presented No. 2)

Without explanation, Indian Coffee asserts that all the courts and commentators (see authorities cited in Petition at 15-16) are wrong in defining "predatory pricing" to require some reasonable expectation on the part of the alleged predator that he will be able to obtain a dominant market position, thereby allowing recoupment of his losses through future supra-normal profits. According to Indian Coffee (Brief at 17-18), the Third Circuit has rejected such a "curious" or "unusual" requirement because neither Robinson-Patman § 2(a) nor *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967), requires it. This simply highlights why review is necessary, since Folger's position is not at all "unusual," but is indeed the predominant view in the lower courts other than the Third Circuit. Folger submits that neither Section 2(a) nor *Utah Pie* precludes the courts from defining "predatory pricing" to require a threshold showing that a defendant has or might expect to attain monopoly power. Indeed, not to require such a showing would almost certainly have a chilling effect on vigorous price competition by smaller competitors and would thus create a fundamental conflict in policy between the Robinson-Patman Act and the Sherman Act.[1] This is an important question concerning enforcement of the antitrust laws which merits this Court's consideration.

B. "Predatory Intent" Should Not Be Inferred From A New Entrant's Unprofitability (Question Presented No. 3)

Indian Coffee's argument on this issue is an obvious "straw man." Folger has never claimed that new entrants have

[1] This Court has repeatedly warned against creating such conflicts by reading the Robinson-Patman Act in an anticompetitive manner. *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 458 (1978); *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 63 (1953); *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80 n.13 (1979).

blanket antitrust immunity. Rather, the questions presented are whether a judicially created evidentiary rule (the "double inference") can logically be applied in the new entry context, and whether such a rule should be rejected as to a new entrant because of its obvious anti-competitive effects. (Petition at 17-18) These are very significant antitrust policy questions, and Indian Coffee has failed to give *any* reasons why this Court should not grant certiorari to consider such issues.

C. Loss of Sales By An Established Seller Following New Entry Does Not Constitute Actual Harm to Competition (Question Presented No. 4)

Indian Coffee apparently concedes that the Third Circuit relied upon the theory that loss of sales by an established seller following a new market entry is proof of harm to competition. Instead of attempting to defend that position, which is in clear conflict with established law and simple economics (Petition at 19-20), Indian Coffee presents a number of factual assertions concerning its supposed proof of "actual harm to competition."[2] However, those contentions were all rejected by the trial court and ignored by the Court of Appeals. Consequently, they are *not* at issue here. The only question here is whether the opinion below adopted an improper standard for proving harm to competition by holding that Indian Coffee's loss of sales, of itself, constitutes "actual competitive injury." Indian Coffee has given this Court no reason why this manifestly incorrect rule of law should not be reviewed.

---

[2] For the most part, these contentions relate to alleged loss of sales share by other competitors (the same issue as is presented with respect to Indian Coffee) or to increased domination of the Pittsburgh sales area, not by Folger, but rather by General Foods, the competitor which raised its market share to over 60% during the relevant time period.

III. THE THIRD CIRCUIT'S DECISION WOULD DESTROY THE AUTHORITY OF TRIAL JUDGES TO ASSESS THE REASONABLENESS OF THE SOURCES UPON WHICH AN EXPERT RELIES IN PRESENTING DAMAGES OPINIONS IN ANTITRUST CASES. (Question Presented No. 5)

Indian Coffee's argument on the evidentiary issue barely mentions Rule 703 and totally ignores the Third Circuit's questionable interpretation of the Rule in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), *cert. granted*, 53 U.S.L.W. 3702 (U.S. April 1, 1985) (No. 83-2004), and this case. (Petition at 21-24) Again, what Indian Coffee concedes with respect to Question 5 is significant — to wit,

(1) that there is a clear conflict among the circuits on the question presented;

(2) that the Third Circuit's reading of Rule 703 deprives District Judges of the discretion to exclude patently improper expert testimony; and

(3) that all of Indian Coffee's damages experts relied upon a critical and (under established antitrust precedents) improper pre-trial opinion of its owner which he retracted at trial.

The arguments advanced by Indian Coffee to justify denying certiorari are not persuasive. First, Indian Coffee presents supposed factual support for its experts' assumption that 14% might be a "normal" trade allowance level. (Brief at 24-35) This misses the point entirely. The critical issue is not whether 14% is "normal," but rather *whether Indian Coffee could have instantly reduced its allowances* from 23% to that supposed "normal" 14% level (i.e., increased prices) *without losing any sales*. This is obviously a marketing question on which *none* of Indian Coffee's experts even purported to give an opinion; they all relied, as the District Judge found, on

Mr. Deily's pre-trial opinion, which he himself thereafter abandoned during trial! Indeed, Mr. Deily conceded, not just that the reduction in allowances could not be accomplished instantaneously, but also that it might not be possible at all! (43A-44A)

Second, Indian Coffee argues that it is reasonable for experts to assume that sellers in a "price leadership" situation (such as pre-Folger Pittsburgh) will "maximize profits" by cooperatively raising prices. As previously discussed (at 3-5, above), such an agrument cries out for this Court's rejection. Such a Clayton Act § 4 damages theory is not legally permissible. The Third Circuit held that expert testimony relying on such a legally improper assumption *must* be admitted merely because the expert thinks it is reasonable. It is obvious that a reading of Rule 703 which requires such admission of patently improper testimony *must* be incorrect, not just as a matter of substantive antitrust law and policy, but as a matter of evidentiary law. This, this is an especially appropriate case for this Court to resolve the conflict between the Third Circuit and other courts as to the proper reading of Rule 703.

CONCLUSION

Essentially, it is Indian Coffee's position, based on its argumentative interpretation of the facts of this case, that the Third Circuit's decision was correct. But Indian Coffee's Brief does not address — much less rebut — Folger's argument that certiorari should be granted. Indeed, Indian Coffee's Brief confirms both the importance of the questions presented in the petition and the conflict among the circuits regarding these questions. The Third Circuit's decision is fundamentally at odds with basic antitrust law and policy. Its interpretation of Robinson-Patman Act § 2(a), Clayton Act § 4, and Rule 703 threaten to do substantial mischief in future antitrust cases unless reviewed and reversed by this Court.

As stated in Folger's petition, the FTC has exhaustively investigated the specific facts and circumstances underlying the

action brought by Indian Coffee in this case. Its findings and decision are in irreconcilable conflict with the opinion of the Third Circuit as a matter both of substantive law and antitrust policy. Folger respectfully suggests that the Court may wish to seek the views of the FTC, as the agency charged by Congress with the primary responsibility for enforcement of the Robinson-Patman Act, as to whether certiorari should be granted with respect to these important issues.

Respectfully submitted,

John W. Beatty, Esq.
DINSMORE & SHOHL
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8200
ATTORNEY FOR PETITIONER
THE FOLGER COFFEE
COMPANY

OF COUNSEL:

Mark Silbersack, Esq.
Patrick D. Lane, Esq.
John D. Luken, Esq.
DINSMORE & SHOHL
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8200

Cloyd R. Mellott, Esq.
John W. Ubinger, Jr., Esq.
ECKERT, SEAMANS, CHERIN & MELLOTT
42nd Floor
600 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 566-6000